Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

83-281

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1983 TERM

IN RE: THE MARRIAGE OF	
JOHN DELANCE THOMPSON	ON PETITION FOR
RESPONDENT,	WRIT OF CERTIORARI
	TO THE SUPREME
AND	COURT OF ILLINOIS
KATHRYN MAE THOMPSON	
PETITIONER	

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR KATHRYN MAE THOMPSON, PETITIONER.

ORAL ARGUMENT IS REQUESTED
IF PETITION IS GRANTED

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1983 TERM

IN RE: THE MARRIAGE OF JOHN DELANCE THOMPSON, RESPONDENT, AND KATHRYN MAE THOMPSON, PETITIONER.	ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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	)	
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	)	
PETITIONER.	)	

PETITION FOR WRIT OF CERTIORARI

(A)
THE QUESTION PRESENTED FOR REVIEW

1. MUST THERE BE CONSISTENCY IN THE APPLICATION OF THE LAW AS TO WHEN MORAL INDISCRETIONS OF A PARENT WILL COST A PARENT LOSS OF CUSTODY OF A CHILD, OR CAN THE STATE COURT TRIAL JUDGE ARBITRARILY APPLY THE RULE OR REFUSE TO APPLY THE RULE IN REACHING HIS DECISION WITHOUT DENYING THE PARENT WHO LOSES CUSTODY OF THE CHILD OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW UNDER THE

14TH AMENDMENT TO THE UNITED STATES CONSTITUTION?

2. CAN THE DETERMINATION OF THE BEST INTEREST OF THE CHILD PRECLUDE THE CONSIDERATION BY THE COURT OF THE MISDEEDS AND MISOMISSIONS BY THE PARENT IN GRANTING CUSTODY OF THE CHILD TO ONE OF THE PARENTS WITHOUT DENYING THE PARENT DENIED CUSTODY OF DUE PROCESS OF THE LAW, AND EQUAL PROTECTION OF THE LAW UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION?

(B)

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Barrow vs. Jackson 346 U.S. 249; 97 L. Ed. 1586 @ p. 1594 73 S. Ct. 1031 Reh. Den. 346 U.S. 841 98 L. Ed. 361, 74 S. Ct. 19.

Fourteenth Amendment to the United States Constitution.

Missouri ex. rel. Gaines vs. Canada 305 U.S. 337, 83 L. ED. 208 @ p. 213, 59 S. Ct. 232 Reh. Den. 305 U.S. 676, 83 L. ED. 437, 59 S. Ct. 356 and conformed to 344 Mo. 1238, 131 SW 2d 217.

(D)

Reference to the official and unofficial reports of any opinions delivered in the courts below:

Opinion appealed from (S. Ct. of Illinois) 449 NE 2d 88, 70 Ill. Dec. 214, 1983, 96 Ill. 2d 67. (Thompson v. Thompson)

Which opinion was an appeal from the Appellate Court of Illinois, Fourth District, found at 100 Ill. App. 3d 1203, 57 Ill. Dec. 815, 429 NE 2d 932.

(E)

Grounds upon which jurisdiction of the Supreme Court of the United States is invoked:

1) Date of Judgment sought to be reviewed and the time of its entry, April

13, 1983.

2) Date of any order respecting a rehearing:

Petition for Rehearing was denied, May 27, 1983.

3) Statutory provision conferring jurisdiction on the Supreme Court to review by Writ of Certiorari.

U.S.C. Ch. 28, Sec. 1257 (c)

"Final judgments of decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:

A. ...

B. ...

C. By Writ of Certiorari, where the validity of a treaty or statute of the United States, or where any title, right, privilege or immunity

IS SPECIALLY SET UP OR CLAIMED UNDER THE CONSTITUTION, TREATIES, OR STATUTES OF, OR, COMMISSION HELD OR AUTHORITY EXERCISED UNDER, THE UNITED STATES."

4) CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE.

"14TH AMENDMENT TO THE UNITED STATES CONSTITUTION, SECTION 1: ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON

WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS."

5. CONCISE STATEMENTS OF THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED:

JOHN AND KATHY THOMPSON WERE MARRIED ON NOVEMBER 16, 1973 IN PONTIAC, MICHIGAN. ONE CHILD WAS BORN AS ISSUE OF THAT MARRIAGE, DANIEL THOMPSON, BORN APRIL 18, 1977.

ON DECEMBER 7, 1979 HE FILED HIS PETITION FOR DISSOLUTION OF MARRIAGE AND FOR TEMPORARY CUSTODY OF HIS SON. THE CIRCUIT COURT OF COLES COUNTY GRANTED TEMPORARY CUSTODY TO JOHN ON DECEMBER 7, 1979. ON DECEMBER 12, 1979 A CIRCUIT COURT IN MICHIGAN GRANTED TEMPORARY CUSTODY OF HER SON, DANNY, TO HER. ON DECEMBER 30, 1979 HE FORCIBLY ABDUCTED DANNY FROM KATHY ON A STREET IN SAGINAW, MICHIGAN, PLACED HIM IN

THE DETECTIVE'S CAR AND SPIRITED HIM OFF TO ILLINOIS.

AFTER JOHN GOT DANNY FROM KATHY IN MICHIGAN, HE TOOK HIM BACK TO THE FAMILY HOME AT R.R. #1, LERNA, ILLINOIS NEAR MATTOON. HE CARRIED ON AN ADULTEROUS AFFAIR THERE WITH ONE, BETTY COFFMAN. SHE TESTIFIED THAT SHE HAD SEXUAL INTERCOURSE WITH JOHN AT LEAST 30 TIMES AND THAT SHE SLEPT WITH JOHN EVERY NIGHT THAT SHE WAS THERE, THAT THEIR BEDROOM WAS NEXT TO DANNY'S BEDROOM. SHE TESTIFIED THAT SHE LEFT JOHN OR BROKE OFF THE RELATIONSHIP BECAUSE OF AN ADULTEROUS AFFAIR HE WAS CONDUCTING WITH ONE, NORMA POTTER.

BETTY COFFMAN TESTIFIED THAT JOHN THREATENED HER AGAINST TESTIFYING IN THE CUSTODY TRIAL BY THREATENING TO SHOW NUDE PICTURES OF HER, AND ATTEMPTED TO GET IN HER HOUSE. SHE HAD TO CALL THE WEST TERRE

HAUTE, INDIANA POLICE. SHE SWORE OUT A WARRANT FOR HIS ARREST IN WEST TERRE HAUTE, INDIANA, WHICH WARRANT IS STILL PENDING FOR ATTEMPT TO BREAK INTO THE HOUSE.

JOHN PREVIOUSLY MARRIED AND DIVORCED. HE HAD TWO CHILDREN BY HIS PREVIOUS MARRIAGE. THE OLDER, A GIRL, HE HASN'T SEEN FOR 9 YEARS. THE YOUNGER, A BOY, HE HAS NEVER SEEN. RESPONDENT'S EXHIBIT # 2 IS A CONSENT ORDER ISSUED BY A MICHIGAN COURT DEDUCTING $100.00 PER WEEK FROM JOHN'S SALARY FOR SUPPORT OF HIS TWO CHILDREN BY THE PREVIOUS MARRIAGE.

6. TIMELY RAISING OF THE FEDERAL QUESTION IN THE STATE COURT

THE CONSTITUTIONAL ARGUMENT IN THIS CASE WAS FIRST RAISED IN THE STATE COURT SYSTEM IN KATHY ALLEN'S PETITION FOR REHEARING IN THE SUPREME COURT OF ILLINOIS.

THIS IS THE FIRST TIME KATHY ALLEN COULD HAVE RAISED THIS CONSTITUTIONAL ARGUMENT SINCE THE BASIS FOR THIS ARGUMENT AROSE FOR THE FIRST TIME, WE SUBMIT, IN THE OPINION OF THE SUPREME COURT OF ILLINOIS, WHEN IT REFUSED TO FOLLOW IT'S REASONING AND RATIONALE IN THE CASE OF JARRETT VS. JARRETT 36 ILL. DEC. 1 @ PAGE 6, 400 NE 2ND 421, 78 ILL. 2ND 337, 1979. INDEED IT DID NOT REVERSE THE JARRETT CASE NOR DID IT DISTINGUISH THE JARRETT CASE BUT REFUSED TO APPLY IT'S PRINCIPLES AND RATIONALE TO THE CASE AT BAR (THIS CASE).

THE SUPREME COURT OF ILLINOIS SAID AT PAGE 7 OF IT'S OPINION,

"THE RESPONDENT, KATHRYN THOMPSON, ARGUES THAT JARRETT VS. JARRETT (1979), 78 ILL. 2ND 337, STRONGLY SUPPORTS THE CONTENTION THAT SHE BE AWARDED THE CHILD. THE RESPONDENT ASSERTS THAT THE APPELLATE COURT IGNORED THE

MANDATE OF JARRETT IN NOT ADDRESSING THE 'MORAL TRANSGRESSIONS' OF JOHN. JARRETT VS. JARRETT (1979), 78 ILL. 2ND 337 IS AUTHORITY FOR THE PROPOSITION THAT A CHILD SHOULD BE PLACED WITH THE PARENT WHO CAN BEST SERVE THAT CHILD. THE JARRETT CASE DOES NOT ESTABLISH A CONCLUSIVE PRESUMPTION THAT BECAUSE A CUSTODIAL PARENT COHABITATES WITH A MEMBER OF THE OPPOSITE SEX, THE CHILD IS HARMED. NO SUCH PRESUMPTION EXISTS IN THIS STATE. THE COURT IN JARRETT INDICATED THAT A CUSTODY AWARD IS NOT ARRIVED AT BY PRESSING ONE LEVER AND MECHANICALLY DENYING CUSTODY TO ONE PARENT; RATHER ALL THE CIRCUMSTANCES MUST BE CONSIDERED THAT AFFECT THE BEST INTERESTS OF THE CHILD. JARRETT VS. JARRETT (1979) 78 ILL. 2ND 337, 344-

45 Ill. Rev. Stat. 1979, Ch. 40, Par. 602."

We submit there is no law under this situation to guide the Trial Judge. There is no law for a parent to follow in order to retain custody of his or her child. He or she does not know what to do or not to do to protect himself or herself in a custody battle. There is no equal protection of the laws under this situation while the Thompson and Jarrett opinions remain unchanged. In this situation we have a government of men and not of laws.

Prior to the Supreme Court of Illinois's decision in Thompson, many people, including KATHRYN THOMPSON, and her attorney, and Justice Moran thought that the Jarrett Case created a conclusive presumption that

BECAUSE A CUSTODIAL PARENT COHABITATES WITH A MEMBER OF THE OPPOSITE SEX, THE CHILD IS HARMED, WHICH OPINION WAS NOT DISPROVEN UNTIL THE THOMPSON OPINION WAS ISSUED.

IN THE THOMPSON DECISION WE FOUND OUT THAT THERE IS NO SUCH CONCLUSIVE PRESUMPTION IN THE LAW OF THE STATE OF ILLINOIS. HOWEVER, FOR PURPOSES OF THIS PETITION FOR WRIT OF CERTIORARI IT MAKES NO DIFFERENCE WHETHER THE PRESUMPTION IN JARRETT IS CONCLUSIVE OR NOT. THE EVIL COMPLAINED OF EXISTS WHETHER THE PRESUMPTION IS CONCLUSIVE OR NOT. THE SUPREME COURT IN THOMPSON DID NOT REVERSE JARRETT, DID NOT DISTINGUISH IT, DID NOT EVEN EXPLAIN IT AWAY, BUT, LEFT THE TWO CASES, JARRETT & THOMPSON DIAMETRICALLY OPPOSED TO EACH OTHER, STANDING AS THE LAW OF THE STATE OF ILLINOIS. WE SUBMIT THERE IS NO LAW BECAUSE OF THIS APPROACH BY THE SUPREME COURT OF ILLINOIS AND HER RIGHTS UNDER THE DUE PROCESS CLAUSE

INCLUDING THE EQUAL PROTECTION OF THE LAWS CLAUSE OF THE UNITED STATES CONSTITUTION (FOURTEENTH AMENDMENT), HAS BEEN DENIED TO KATHRYN THOMPSON.

SINCE THIS SITUATION AROSE WITH THE PUBLICATION OF THE THOMPSON OPINION, AND DID NOT EXIST PRIOR THERETO, KATHRYN THOMPSON URGED THE CONSTITUTIONAL ARGUMENT SHE IS URGING IN THIS COURT AT THE EARLIEST POSSIBLE TIME THEREAFTER AND THAT WAS IN THE FILING OF THE PETITION FOR REHEARING. ON PAGE 7 THEREOF, SHE STATED:

> "KATHRYN MAE THOMPSON WAS DENIED THE RIGHTS TO DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION, BEING THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHICH PROVIDES "NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW,' AND ARTICLE I OF SECTION 2 OF THE ILLINOIS

CONSTITUTION WHICH PROVIDES,

"NO PERSON SHALL BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW.'

WE STATE THAT HER RIGHTS UNDER BOTH OF THESE DUE PROCESS CLAUSES, THAT IS THE FEDERAL AND STATE DUE PROCESS CLAUSES, WERE DENIED BY:

A. ...

B. THE COURT IN FAILING TO OVERRULE THE LAW OF THE JARRETT CASE, BUT REFUSING TO APPLY THE RULE IN IT TO THIS CASE AT BAR, HAS CREATED A SITUATION WHERE THERE IS INDEED NO LAW TO GOVERN THE DISPOSITION OF CUSTODY CASES IN THE STATE OF ILLINOIS. THERE ARE NO YARDSTICKS TO FOLLOW. IT LEAVES THE JUDGE FREE TO ALLOW HIS WHIM, CAPRICE, BIAS OR ARBITRARINESS. THE FACT THAT THERE IS NO LAW IN THE STATE OF ILLINOIS TO GOVERN THIS TYPE

OF SITUATION DENIES KATHRYN MAE THOMPSON DUE PROCESS OF LAW IN THE LOSS OF THE CUSTODY OF HER SON, DANNY.

THE NET RESULT OF THIS CASE, LEAVING THE RULE ANNOUNCED IN THE JARRETT CASE UNREVERSED, IS TO RESULT IN NO LAW AT ALL FOR THE PEOPLE OF THE STATE OF ILLINOIS, ITS JUDGES AND ATTORNEYS TO FOLLOW IN A CUSTODY CASE, BUT PERMITS THE TRIAL COURT TO ACT ACCORDING TO HIS OR HER PERSONAL BIAS, PREJUDICE, WHIM OR CAPRICE. KATHRYN MAE THOMPSON HAS BEEN DENIED HER RIGHTS TO DUE PROCESS OF LAW UNDER THE ILLINOIS AND FEDERAL CONSTITUTIONS."

WE SUBMIT THAT KATHRYN THOMPSON RAISED THE UNITED STATES CONSTITUTIONAL ARGUMENT IN THE STATE COURTS OF ILLINOIS AT THE EARLIEST POSSIBLE TIME.

7. ARGUMENT

MAY IT PLEASE THE COURT: THE LAW, LIKE THE RAIN, SHOULD FALL ON EVERYBODY EQUALLY. UNFORTUNATELY, IN THIS CASE, THE LAW HAS NOT BEEN APPLIED EQUALLY. IN THIS CASE, THE WIFE, THE PETITIONER HEREIN, KATHRYN THOMPSON, LOST CUSTODY OF HER SON, DANNY THOMPSON, BORN APRIL 18, 1977, TO HER HUSBAND, JOHN THOMPSON, BY VIRTUE OF ORDER OF THE CIRCUIT COURT OF COLES COUNTY, ILLINOIS. WE SUBMIT THAT THE RECORD IS REPLETE WITH MORAL TRANSGRESSIONS OF JOHN THOMPSON, THE BOY'S FATHER. WE HAVE NOT BROUGHT THE RECORD ON APPEAL TO THIS COURT FROM THE SUPREME COURT OF ILLINOIS SINCE MOST OF THE POINTS COVERED IN THIS PETITION CAN BE SHOWN FROM THE OPINION APPEALED FROM. WE SUBMIT FURTHER THE RECORD IS SILENT AS TO ANY MORAL TRANSGRESSIONS ON THE PART OF THE MOTHER, PETITIONER HEREIN, KATHRYN THOMPSON.

AMONG THE THINGS THAT THE FATHER, JOHN

THOMPSON, DID WHICH ARE IN THE RECORD, AND RECITED IN THE ATTACHED OPINION OF THE SUPREME COURT OF ILLINOIS, MOST OF WHICH ARE UNDISPUTED BY HIM, ARE AS FOLLOWS:

1. JOHN WRONGFULLY REMOVED DANNY FROM THE STATE OF MICHIGAN BY USING SELF-HELP, FORCE, VIOLENCE, AND STEALTH. HIS INITIAL CUSTODY OF THE CHILD WAS OBTAINED WITHOUT DUE PROCESS OF LAW; WITH VIOLENCE AND FORCE, BY TAKING THE CHILD PHYSICALLY FROM THE CHILD'S MOTHER IN THE STATE OF MICHIGAN. AS SOON AS HE OBTAINED THE CHILD, THEN HE RETURNED TO ILLINOIS, AND HAS HAD THE CHILD EVER SINCE THAT TIME.

2. HE COMMITTED ADULTERY WHILE HE WAS LIVING WITH HIS WIFE, KATHY, AND AFTER THEY SEPARATED, HE LIVED IN OPEN AND NOTORIOUS ADULTERY WITH HIS GIRLFRIEND, BETTY COFFMAN, FOR APPROXIMATELY FIVE (5) MONTHS IN THE CONTINUAL PRESENCE OF HIS SON, DANNY. HE COMMITTED ADULTERY WITH HIS PRESENT WIFE,

NORMA POTTER.

3. He criminally intimidated the witness, BETTY COFFMAN, which resulted in the swearing out of a warrant for his arrest by her against him in West Terre Haute, Indiana. The intimidation consisted of his threatening to show nude pictures of her to other people, and other veiled unspecified threats, including trying to beat his way through her door into her house to keep her from testifying against him on the custody issue.

4. He forged his wife's name to their Income Tax Return; he forged her name to the refund check from the IRS.

5. According to his employer, H & F Trucking, his lack of honesty and his taking valuable items of personal property which belonged to his employer, without the employer's permission, were the reasons that the employer refused to rehire him

AFTER HE HAD QUIT.

6. HIS PREVIOUS RECORD OF VISITATION WITH HIS CHILD BY A PREVIOUS MARRIAGE WAS SOMETHING LESS THAN WHAT WOULD BE EXPECTED OF A FATHER INTERESTED IN HIS CHILDREN; HE HAD SEEN ONE OF THE CHILDREN, THE OLDER CHILD, NINE YEARS BEFORE, THE YOUNGER CHILD HE HAD NEVER SEEN.

7. THERE IS EVIDENCE IN THE RECORD THAT HE WAS FORCED BY COURT ORDER TO SUPPORT HIS CHILDREN BY A PREVIOUS MARRIAGE.

8. ON A PETITION TO REOPEN THE CASE TO OFFER ADDITIONAL EVIDENCE WHICH WAS DENIED BY THE TRIAL COURT, WHICH DENIAL WAS AFFIRMED BY THE APPELLATE AND SUPREME COURTS OF ILLINOIS, IT WAS ALLEGED THAT AFTER THE CUSTODY HEARING HAD ENDED, HE WAS FIRED FROM HIS JOB WHERE HE WAS WORKING AT THE TIME OF THE CUSTODY HEARING IN ST. LOUIS, MISSOURI, THAT HE HAD TAKEN BANKRUPTCY, AND THAT HE HAD MARRIED HIS PRESENT WIFE

SOME FOUR (4) MONTHS BEFORE HE WAS FORMALLY DIVORCED FROM KATHRYN THOMPSON IN THIS DIVORCE PROCEEDING.

THE APPELLATE COURT, 100 ILL. APP. 3D 1203, 57 ILL. DEC. 815, 429 NE 2D 932, FOUND THAT THERE WAS EVIDENCE IN THE RECORD THAT IT WAS IN THE BEST INTEREST OF THE CHILD TO AWARD THE CHILD TO THE FATHER, AND DEALT WITH THE JARRETT VS. JARRETT CASE, BY DISTINGUISHING IT AND STATING ON PAGE FIVE (5) OF ITS OPINION, SAID, "THIS CONDUCT, ALTHOUGH NOT TO BE CONDONED, WAS NOT COMPARABLE TO THAT HELD TO BE SUFFICIENT OF ITSELF TO JUSTIFY TO THE TRIAL COURT IN CHANGING THE CUSTODY OF CHILDREN 7, 10 AND 12 YEARS OF AGE IN JARRETT VS. JARRETT, 78 ILL. 2D 337 400 NE 2D 421. THERE THE CUSTODIAL SPOUSE AND PARAMOUR COHABITED OPENLY AND CONTINUOUSLY, AND THE CHILDREN WERE AWARE OF THE INPROPRIETY OF THEIR RELATIONSHIP."

THE SUPREME COURT OF ILLINOIS, HOWEVER,

IN ITS OPINION WHICH PROMPTED THIS PETITION FOR WRIT OF CERTIORARI, AND WHICH OPINION CAUSED THE VIOLATION OF KATHRYN THOMPSON'S CONSTITUTIONAL RIGHTS, ARGUED IN THIS PETITION FOR WRIT OF CERTIORARI, TREATED THE JARRETT VS. JARRETT CASE IN A DIFFERENT LIGHT. THE THOMPSON OPINION IS FOUND AT 449 NE 2D 88 70 ILL. DEC. 214 96 ILL. 2D 67, AND ALSO APPENDED TO THIS PETITION FOR WRIT OF CERTIORARI. IN THAT CASE THE ILLINOIS SUPREME COURT DID NOT DISTINGUISH THE JARRETT VS. JARRETT DECISION, DID NOT REVERSE IT OR OVER-RULE IT. ON PAGE 219 OF THE ILL. DEC. OPINION, THE COURT SAID:

"THE RESPONDENT, KATHRYN THOMPSON, ARGUES THAT JARRETT VS. JARRETT, 1979, 78 ILL. 2D 337 36 ILL. DEC. 1, 400 NE 2D 421, STRONGLY SUPPORTS HER CONTENTION THAT SHE SHOULD BE AWARDED THE CHILD. THE RESPONDENT ASSERTS THAT THE APPELLATE COURT IGNORED THE MAN-

DATE OF JARRETT IN NOT ADDRESSING THE MORAL TRANSGRESSIONS OF JOHN. JARRETT VS. JARRETT, 1979, 78 ILL. 2D 337, 36 ILL. DEC. 1, 400 NE 2D 421, IS AUTHORITY FOR THE PROPOSITION THAT A CHILD SHOULD BE PLACED WITH A PARENT WHO CAN BEST SERVE THAT CHILD. THE JARRETT CASE DOES NOT ESTABLISH A CONCLUSIVE PRESUMPTION THAT, BECAUSE A CUSTODIAL PARENT COHABITS WITH A MEMBER OF THE OPPOSITE SEX, THE CHILD IS HARMED. NO SUCH PRESUMPTION EXISTS IN THIS STATE. THE COURT IN JARRETT INDICATED THAT A CUSTODY AWARD IS NOT ARRIVED AT BY PRESSING ONE LEVER AND MECHANICALLY DENYING CUSTODY OF THE ONE PARENT; RATHER ALL OF THE CIRCUMSTANCES MUST BE CONSIDERED THAT AFFECT THE BEST INTERESTS OF THE CHILD. JARRETT VS. JARRETT 1979, 78 ILL. 2D 337, 344-45, 36 ILL. DEC. 1, 400 NE 2D 421, ILL.

REV. STAT. 1979, CH. 40, PAR. 602."

WE SUBMIT THAT FOR PURPOSES OF THIS APPEAL LEAVING THE JARRETT CASE UNREVERSED, AND UNDISTINGUISHED FROM THIS CASE CREATES A SITUATION IN THE STATE OF ILLINOIS WHERE THE TRIAL JUDGE IN A CUSTODY CASE IS GOVERNED BY NO LAW AT ALL.

WE SUBMIT FURTHER THAT THE PRESUMPTION THAT, "BECAUSE A CUSTODIAL PARENT COHABITS WITH A MEMBER OF THE OPPOSITE SEX, THE CHILD IS HARMED," IS NOT CONCLUSIVE IN DEALING WITH THE ARGUMENT RAISED IN THIS PETITION, DOES NOT REMEDY THE EVIL WHICH HAS ARISEN BY THE ISSUANCE OF THE THOMPSON OPINION BY THE SUPREME COURT OF ILLINOIS. THE FACT OF THE MATTER IS THAT THE JARRETT OPINION IS LEFT UNTOUCHED BY THE THOMPSON OPINION EXCEPT TO STATE THAT THE PRESUMPTION REFERRED TO ABOVE IS NOT CONCLUSIVE, AND THE THOMPSON OPINION, AND THE HOLDING THEREIN, IS DIAMETRICALLY OPPOSED TO THE JARRETT DECISION.

INDEED IN THE JARRETT CASE, CUSTODY WAS CHANGED BECAUSE OF MORAL INDISCRETIONS OF ONE OF THE PARENTS AND FOR NO OTHER REASON, AND IN THE THOMPSON OPINION THE COURT COMPLETELY IGNORED THE MORAL INDISCRETIONS OF THE PARENT TO WHOM THE CHILD WAS AWARDED.

WE SUBMIT THAT THE RULINGS IN THESE TWO PARTICULAR CASES, THE JARRETT AND THE THOMPSON OPINION, ARE SO DIVERGENT THAT THEY AMOUNT TO NO LAW AT ALL. STANDING AS THEY DO, UNDISTURBED BY EACH OTHER, THEY PERMIT THE TRIAL JUDGE TO DECIDE THESE CASES ON ANY REASON, OR NO REASON AT ALL. HE COULD EASILY DECIDE THE CASE ON THE BASIS OF HIS BIAS, PREJUDICE, WHIM OR CAPRICE. HIS DECISION COULD BE ARBITRARY, AND AS LONG AS HE COMES UP WITH THE MAGIC LANGUAGE AND FINDS THAT THE CUSTODY IS AWARDED BECAUSE IT IS IN THE BEST INTERESTS OF THE CHILD, THE UNDERLYING FACTS OF THE CASE WOULD SEEM TO HAVE NO EFFECT. IN DEALING WITH THIS SITUATION,

THERE IS NO LAW. THERE IS NO LAW FOR THE PARENTS AND THE ATTORNEYS TO FOLLOW WITH ANY CERTAINTY; THERE IS NO LAW WHEREBY A TRIAL JUDGE CAN BE REVIEWED. HE CAN SAY THAT MORAL INDISCRETION HARMS THE CHILD, OR HE CAN SAY THAT IT DOES NOT HAR THE CHILD.

PROTECTION FROM ARBITRARY ACTION BY THE STATE IS THE ESSENCE OF SUBSTANTIVE DUE PROCESS; VOL. 16A AM. JUR. 2D, CONSTITUTIONAL LAW SEC. 816 @ P. 978.

EQUAL PROTECTION OF THE LAWS MEANS THAT NO PERSON, OR CLASS OF PERSONS, SHALL BE DENIED THE SAME PROTECTION OF THE LAWS WHICH IS ENJOYED BY THE PERSONS OR OTHER CLASSES IN LIKE CIRCUMSTANCES IN THEIR LIVES, LIBERTY AND PROPERTY. EQUAL PROTECTION OF THE LAWS IS A PLEDGE OF PROTECTION OF EQUAL LAWS; VOL. 16A, AM. JUR. 2D, CONSTITUTIONAL LAW SEC. 737 @ P. 774; MISSOURI EX.REL. GAINES VS. CANADA 305, U.S. 337, 83 L. ED. 208 @ P. 213, 59 S. CT.

232 REH. DEN. 305 U.S. 676 83 L. ED. 437, 59 S. CT. 356 AND CONFORMED TO 344 MO. 1238, 131 SW 2D 217.

EQUAL PROTECTION OF THE LAWS AS PROVIDED BY THE 14TH AMENDMENT INCLUDES THE JUDICIAL DIVISIONS OF THE STATE GOVERNMENT; VOL. 16A AM. JUR. 2D, CONSTITUTIONAL LAW, SEC. 742 @ P. 790; BARROWS VS. JACKSON 346 U.S. 249; 97 L. ED. 1586 @ 1594, 73 S. CT. 1031, REH. DEN, 346 U.S. 841; 98 L. ED. 361, 74 S. CT. 19.

EQUAL PROTECTION GUARANTEED BY THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION PROTECTS AGAINST DISPARITY IN TREATMENT BY A STATE BETWEEN CLASSES OF INDIVIDUALS WHOSE SITUATIONS ARE ARGUABLY INDISTINGUISHABLE; VOL. 16A AM JUR. 2D, CONSTITUTIONAL LAW SEC. 740 @ P. 782.

THERE IS NOTHING A PARENT CAN DO TO PROTECT HIMSELF OR HERSELF IN A CUSTODY BATTLE WHERE THE LAW REMAINS SO DIVERGENT THAT INDEED IT AMOUNTS TO NO LAW AT ALL.

THIS IS, WE SUBMIT, A SUBJECTIVE TEST OF THE TRIAL JUDGE. THERE IS NO WAY TO MEASURE WHAT HE HAS DONE AND NOT DONE IN REACHING HIS DECISION. INDEED IT AMOUNTS TO A GOVERNMENT OF MEN AND NOT LAWS IN THE AREA OF AWARDING CUSTODY IN THE STATE OF ILLINOIS. THE PARENT HAS NO WAY OF KNOWING WHAT THEY SHOULD OR SHOULD NOT DO TO PROTECT THEMSELVES IN A CUSTODY BATTLE. INDEED THE COMPLETE IGNORING OF THE ACTIONS OF THE PARENTS, THAT IS, THE MISDEEDS AND MISOMISSIONS, IN EFFECT, DENIES THE PARENT LOSING CUSTODY OF DUE PROCESS OF LAW. SINCE THAT PARENT HAS A PROPERTY RIGHT IN THE CHILD INVOLVED, THERE HAS TO BE SOME MEASURE OF THE RIGHT TO HAVE CUSTODY OF THE CHILD BASED UPON THE PARENTS ACTIONS, DEEDS, OR MISDEEDS, OR MISOMISSIONS. OTHERWISE, WE SUBMIT, THE PARENT IS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION,

AND IS DENIED EQUAL PROTECTION OF THE LAW.

THE SUPREME COURT ON PAGE 219 OF ITS THOMPSON OPINION IN THE ILLINOIS DECISIONS OPINION SAID, "THE COURT IN JARRETT INDICATED THAT A CUSTODY AWARD IS NOT ARRIVED AT BY PRESSING ONE LEVER, AND MECHANICALLY DENYING CUSTODY TO ONE PARENT; RATHER ALL THE CIRCUMSTANCES MUST BE CONSIDERED THAT EFFECT THE BEST INTERESTS OF THE CHILD."

WE BELIEVE THAT WHAT THE COURT DID IN THOMPSON WAS JUST EXACTLY THE OPPOSITE OF WHAT IT SAID IT DID IN JARRETT. WE SUBMIT THAT IN THE THOMPSON CASE IT PRESSED ONE LEVER, AND THAT LEVER IS THE FINDING BY THE TRIAL JUDGE THAT IT IS IN THE BEST INTERESTS OF THE CHILD TO BE AWARDED TO HIS FATHER, AND COMPLETELY IGNORING ALL UNDERLYING CIRCUMSTANCES THAT AFFECT THE BEST INTERESTS OF THE CHILD.

THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION GUARANTEES ALL SUB-

JECTS OF THE UNITED STATES, INCLUDING KATHRYN THOMPSON, TO BE TREATED EQUALLY UNDER THE LAW, AND NOT TO BE DENIED HER PROPERTY WITHOUT DUE PROCESS OF LAW.

WE SUBMIT THAT SHE WAS DENIED HER PROPERTY WITHOUT DUE PROCESS OF LAW, THAT PROPERTY BEING HER SON, DANNY, FOR REASON THAT INDEED THERE IS NO SUBSTANTIVE LAW GOVERNING THE AWARDING OF CUSTODY IN THE STATE OF ILLINOIS, IN LIGHT OF LEAVING THE JARRETT AND THE THOMPSON CASES UNDISTURBED SIDE BY SIDE. THERE IS NO LAW FOR A TRIAL JUDGE TO FOLLOW. THERE IS NO LAW FOR THE PARENT TO FOLLOW. IF IN THE ONE CASE, THE JARRETT CASE, THE PARENT CAN LOSE CUSTODY FOR MORAL INDISCRETIONS, THEN THE NEXT CASE THE PARENT, IN THOMPSON, DOES NOT LOSE CUSTODY,THEN INDEED THERE IS NO EQUAL PROTECTION OF THE LAWS FOR BOTH PARENTS, AND ESPECIALLY FOR THE PARENT LOSING CUSTODY.

CONCLUSION

KATHRYN THOMPSON COMPLAINS TO THIS COURT THAT SHE HAS NOT RECEIVED DUE PROCESS OF LAW, AND EQUAL PROTECTION OF THE LAW FROM THE COURTS OF THE STATE OF ILLINOIS IN THE LOSS OF THE CUSTODY OF HER SON, DANNY, WHICH RIGHTS ARE GUARANTEED TO HER BY THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

SHE SUBMITS THAT THIS CASE WHEN COMPARED TO THE JARRETT VS. JARRETT OPINION CREATES A SITUATION OF NO LAW IN DETERMINING WHEN AND IF MORAL INDISCRETION OF A PARENT WILL AFFECT THE AWARD OF CUSTODY OF A CHILD.

SHE STATES THAT SHE HAS LOST CUSTODY OF HER SON BASED ON THE WHIM, CAPRICE, AND ARBITRARY ACTION OF THE TRIAL JUDGE, AND THEREFORE HER CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED.

SHE ASKS THAT THIS COURT WILL GRANT HER PETITION FOR WRIT OF CERTIORARI SO THAT HER CONSTITUTIONAL RIGHTS CAN BE GRANTED TO HER BY THIS COURT, AND THAT CUSTODY OF HER SON, DANNY, BE AWARDED TO HER.

RESPECTFULLY SUBMITTED,

KATHRYN THOMPSON
BY: THOMAS J. LOGUE, HER ATTORNEY
GLENN & LOGUE, ATTORNEYS
901 CHARLESTON AVENUE
MATTOON, ILLINOIS 61938

ATTORNEYS FOR KATHRYN THOMPSON, PETITIONER.

APPENDIX

IN RE MARRIAGE OF JOHN DELANCE THOMPSON, APPELLEE, AND KATHRYN MAE THOMPSON, APPELLANT.

JUSTICE CLARK DELIVERED THE OPINION OF THE COURT:

AN ORDER WAS ENTERED IN THE CIRCUIT COURT OF COLES COUNTY ON MAY 6, 1981, DISSOLVING THE MARRIAGE OF KATHRYN MAE THOMPSON TO JOHN DELANCE THOMPSON. KATHRYN THOMPSON APPEALED CERTAIN PORTIONS OF THE ORDER AND ALSO ASSERTED THAT THE COURT SHOULD HAVE DEFERRED JURISDICTION TO A TRIAL COURT IN THE STATE OF MICHIGAN. IN HER APPEAL KATHRYN CONTENDED THAT THE AWARD OF CUSTODY WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE, THE DIVISION OF PROPERTY WAS ERRONEOUS, THE COURT ERRED IN SUSTAINING THE OBJECTION TO HER OFFER OF PROOF OF PETITIONER'S REPUTATION, AND THE TRIAL COURT ERRED IN REFUSING TO ALLOW HER TO REOPEN HER CASE.

THE APPELLATE COURT FOUND THAT (A) THE CIRCUIT COURT OF COLES COUNTY ACTED

PROPERLY IN REFUSING TO DEFER JURISDICTION TO A TRIAL IN THE STATE OF MICHIGAN; (B) THE AWARD OF PERMANENT CUSTODY TO JOHN DELANCE THOMPSON WAS NOT CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE OR A BREACH OF DISCRETION; (C) THERE WAS NO ERROR IN THE DIVISION OF PROPERTY EXCEPT FOR AN APPARENT INADVERTENT OMISSION OF $371 THAT WAS DUE KATHRYN MAE THOMPSON; (D) THE TRIAL COURT PROPERLY SUSTAINED THE OBJECTION TO THE RESPONDENT'S OFFER OF PROOF OF PETITIONER'S REPUTATION; AND (3) THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO REOPEN THE CASE. 100 ILL. APP. 3D 1203 (RULE 23 ORDER).

JOHN AND KATHRYN THOMPSON WERE MARRIED ON NOVEMBER 16, 1973 IN PONTIAC, MICHIGAN. THEREAFTER, JOHN THOMPSON TOOK A POSITION WITH MCBRIDE'S EXPRESS IN DECATUR, ILLINOIS. JOHN AND KATHRYN WERE LIVING IN DECATUR ON APRIL 18, 1977, WHEN THEIR ONLY CHILD, DANIEL,

WAS BORN. IN AUGUST OF 1977, WHEN DANIEL WAS APPROXIMATELY FOUR MONTHS OLD, THE FAMILY MOVED TO LERNA, ILLINOIS, WHERE JOHN ACCEPTED A POSITION WITH THE H & F TRUCKING COMPANY.

ON NOVEMBER 30, 1979, JOHN TOLD KATHRYN THAT HE HAD TO LEAVE TOWN ON BUSINESS, WHEN IN FACT HE INTENDED TO SPEND THE NIGHT IN COLLINSVILLE, ILLINOIS, WITH A FEMALE BUSINESS ASSOCIATE. KATHRYN WAS AWARE OF WHAT ACTUALLY OCCURRED AND ON DECEMBER 1, 1979, SHE LEFT DECATUR WITH DANIEL AND LEFT A NOTE INDICATING THAT SHE WAS RETURNING TO HER PARENT'S HOME BECAUSE HER FATHER WAS ILL.

JOHN CONSTANTLY CALLED TO INQUIRE ABOUT KATHRYN AND DANIEL. KATHRYN AT FIRST DENIED THERE WERE ANY MARITAL PROBLEMS, AND SHE ATTEMPTED TO CONCEAL HER WHEREABOUTS AND THE WHEREABOUTS OF THE CHILD.

ON DECEMBER 7, 1979, JOHN FILED A

PETITION IN THE CIRCUIT COURT OF COLES COUNTY FOR DISSOLUTION OF MARRIAGE AND FOR TEMPORARY CUSTODY OF THE CHILD. IN THE PETITION IT WAS ALLEGED THAT THE CHILD HAD MEDICAL PROBLEMS AND IT WAS IN THE BEST INTEREST OF DANIEL THAT CUSTODY BE AWARDED TO THE FATHER. THE PETITION WAS ALLOWED, AND AN ORDER WAS ENTERED ON DECEMBER 7, 1979, GRANTING TEMPORARY CUSTODY TO THE FATHER.

JOHN CONTINUED TO CALL ON A REGULAR BASIS, TRYING TO CONTACT HIS WIFE OR HER PARENTS, IN ORDER TO DETERMINE THE CONDITION AND WHEREABOUTS OF HIS SON. ON DECEMBER 10, 1979, JOHN RETAINED THE SERVICES OF AN INVESTIGATIVE AGENCY.

FOLLOWING A SHORT STAY AT HER PARENTS' HOME KATHRYN MOVED WITH DANIEL TO A HOME FOR BATTERED WOMEN IN SAGINAW, MICHIGAN. ON DECEMBER 12, 1979, KATHRYN FILED FOR AND WAS GRANTED TEMPORARY CUSTODY OF HER SON

IN THE CIRCUIT COURT FOR SAGINAW COUNTY IN THE STATE OF MICHIGAN.

ON DECEMBER 30, 1979 THE INVESTIGATOR JOHN HAD HIRED NOTIFIED JOHN THAT HE HAD LOCATED KATHRYN AND DANIEL. JOHN ARRANGED TO FLY TO MICHIGAN, WITH THE COURT ORDER IN HAND, TO OBTAIN PHYSICAL CUSTODY OF HIS SON. JOHN FORCIBLY ABDUCTED HIS SON FROM KATHRYN ON A STREET IN SAGINAW, MICHIGAN, PLACED DANIEL IN THE DETECTIVE'S CAR AND PROCEEDED TO THE INVESTIGATOR'S HOME. AT THAT TIME HE CALLED THE SAGINAW POLICE DEPARTMENT AS WELL AS KATHRYN'S ATTORNEY IN MICHIGAN TO NOTIFY THEM OF THE SITUATION. JOHN DENIES THAT HE KNEW THEN THAT THERE WAS A COURT ORDER GIVING CUSTODY OF DANNY TO KATHRYN. THE INVESTIGATOR INDICATED THAT HIS EMPLOYEES HAD ATTEMPTED TO DISCOVER IF THERE WAS A COURT PROCEEDING PENDING CONCERNING CUSTODY, BUT THAT THEY HAD FAILED TO DISCOVER ANYTHING.

THE INVESTIGATOR, ROBERT SWARTWOOD,

TESTIFIED AS TO DANNY'S PHYSICAL CONDITION AT THE TIME THE CHILD WAS PICKED UP IN SAGINAW.

ACCORDING TO MR. SWARTWOOD, DANNY WAS WITHOUT MITTENS, HIS CHEEKS WERE WINDBURNED, HE HAD A COLD WITH A DEEP COUGH, HE HAD A SMALL BRUISE UNDER ONE EYE, AND THAT EYE WAS CONSTANTLY TEARING. THE INVESTIGATOR'S WIFE, WHO WAS PRESENT WHEN DANNY WAS FOUND, TESTIFIED THAT SHE ALSO EXAMINED DANNY AT THE TIME AND FOUND CHAPPED LIPS, TEARING IN ONE EYE, AND A RUNNY NOSE.

AFTER JOHN TOOK DANNY FROM KATHRYN, HE TRAVELED BACK TO THE FAMILY HOME IN LERNA, ILLINOIS. UPON ARRIVING BACK IN LERNA, JOHN TOOK DANNY TO SEE A DOCTOR ON THREE SUCCESSIVE DAYS; ANTIBIOTICS AND EARDROPS WERE PRESCRIBED. ACCORDING TO JOHN, DANNY'S RIGHT EAR WAS INFLAMED, HIS LEFT EAR WAS FULL OF WAX, AND WHEN SPOKEN TO BY HIS FATHER HE HAD TROUBLE HEARING HIM.

Further ear surgery was required in March of 1980.

Following the father's and son's arrival back in Lerna, John went back to work for H & F Trucking Company. He and Danny continued to live in the same home in Lerna that had been the marital residence.

In January of 1980, John began seeing a woman by the name of Betty Coffman. Ms. Coffman and John saw each other regularly for the next five months, with Ms. Coffman frequently spending weekends at John's home. During two of those months John also had a cousin by the name of Kenneth Dolson living in the house. Ms. Coffman testified that during her weekend visits she slept with John, and that she took the same care of Danny that she took with her own two children. Ms. Coffman indicated that Danny always had the sniffles, coughed frequently and had ear trouble. She further testified

THAT SHE WOULD CHANGE HIS DIAPERS, COOK HIS MEALS, AND CHANGE AND WASH HIS CLOTHES. MS. COFFMAN TESTIFIED ON CROSS-EXAMINATION THAT JOHN WAS A GOOD, LOVING FATHER WHO LOOKED AFTER THE MEDICAL AND OTHER NEEDS OF HIS CHILD. SHE ALSO TESTIFIED THAT JOHN AND SHE TALKED ON SEVERAL OCCASIONS PRIOR TO THE CUSTODY HEARING AND ON ONE SUCH OCCASION, ACCORDING TO MS. COFFMAN, JOHN REMINDED HER THAT "I (JOHN) HAVE SOME PICTURES AND DON'T FORGET THERE IS A CUSTODY HEARING COMING UP." MS. COFFMAN INDICATED THAT THE PICTURES JOHN WAS REFERRING TO WERE NUDE PICTURES OF MS. COFFMAN THAT JOHN HAD TAKEN WHEN THEY WERE SEEING ONE ANOTHER.

MS. COFFMAN ALSO TESTIFIED THAT JOHN CAME TO HER HOUSE IN WEST TERRE HAUTE, INDIANA, ONE EVENING AND THAT SHE WOULD NOT OPEN THE DOOR. JOHN SAID HE WANTED TO TALK WITH HER. SHE WOULD NOT TALK TO HIM BECAUSE SHE WAS AFRAID OF HIM. JOHN SAID

THAT HE WOULD BE BACK AND THAT SHE HAD NOT SEEN THE LAST OF HIM. MS. COFFMAN SWORE OUT A WARRANT FOR JOHN'S ARREST WHICH IS STILL PENDING; JOHN DID NOT RETURN. MS. COFFMAN INDICATED THAT SHE BROKE OFF THE RELATIONSHIP WITH JOHN BECAUSE HE WAS SEEING ANOTHER WOMAN.

SOON AFTER JOHN AND DANNY RETURNED TO THE HOME IN LERNA, JOHN MADE ARRANGEMENTS FOR DANNY'S DAY CARE AT THE HOME OF VIRGINIA SONS.

MRS. SONS TESTIFIED THAT WHEN SHE FIRST MET DANNY HE WAS INSECURE, CLINGING AND SICKLY. SHE ALSO TESTIFIED THAT HE TIRED EASILY AND HAD COLDS, WHICH INCLUDED EAR INFECTIONS. SHE FURTHER FOUND THAT HE WAS UNDISCIPLINED, NOT POTTY-TRAINED, AND HAD POOR EATING HABITS. SHE FELT HE WAS OVER-WEIGHT, WITHDRAWN AND IN NEED OF SPECIAL ATTENTION. HER HUSBAND, GERALD SONS, TESTIFIED THAT WHEN HE FIRST SAW

DANNY HE WAS INSECURE, SICKLY, CRIED A LOT AND WAS A PICKY EATER. MRS. SONS FELT THAT SHE SAW DRAMATIC CHANGES IN DANNY WITHIN THE FIRST SIX MONTHS THAT JOHN HAD DANNY. SHE TESTIFIED THAT DANNY WAS LESS SUSCEPTIBLE TO COLDS, THAT HE DID NOT TIRE AS EASILY, AND THAT HIS EAR INFECTIONS CLEARED UP. SHE OBSERVED HIM BECOME COMFORTABLE, MORE STABLE AND SECURE. SHE OBSERVED A HAPPY LITTLE BOY, GLAD TO SEE HIS FATHER. MRS. SONS TESTIFIED THAT JOHN'S ATTITUDE TOWARDS HIS SON WAS VERY GOOD, THAT HE (JOHN) WAS A CONCERNED, RESPONSIVE PARENT, AND THAT AS A RESULT THE CHILD SLIMMED DOWN AND APPEARED TO BE VERY CONTENT.

VIRGINIA'S HUSBAND, GERALD SONS, TESTIFIED THAT, DURING THE PERIOD OF TIME IN 1980 WHEN HE WAS AROUND THE BOY, DANNY'S EMOTIONAL CONDITION IMPROVED AND HE WAS WELL ADJUSTED. MR. SONS FELT THAT JOHN WAS CONSCIENTIOUS AND OBSERVED JOHN AND DANNY

KISSING AND HUGGING ON MANY OCCASIONS.

KATHRYN'S FIRST EFFORT TO CONTACT DANNY OCCURRED ON JANUARY 25, 1980, ALMOST FOUR WEEKS AFTER JOHN HAD BROUGHT HIM BACK HOME. KATHRYN TALKED TO DANNY ON THE TELEPHONE ON MARCH 9, 1980. KATHRYN ADMITTED, UNDER CROSS-EXAMINATION, THAT SHE DID NOT INQUIRE ABOUT DANNY BETWEEN JANUARY 25, 1980, AND MARCH 9, 1980. KATHRYN DID NOT MAKE ANY DIRECT CALLS TO JOHN OR TO DANNY OR VISIT DANNY BETWEEN MARCH 9, 1980 AND A VISITATION WHICH OCCURRED IN NOVEMBER OF 1980.

AROUND EASTER OF 1980, KATHRYN SENT AN EASTER CARD TO DANNY AND AGAIN AROUND HIS BIRTHDAY IN APRIL SHE SENT A BIRTHDAY CARD AND DOLL. SHE SENT ANOTHER CARD IN JULY OF 1980. THE FINAL WRITTEN COMMUNICATION OCCURRED NEAR THANKSGIVING OF 1980 WHEN SHE SENT A THANKSGIVING CARD.

ON JULY 1, 1980, KATHRYN APPEARED IN THE CIRCUIT COURT OF COLES COUNTY AND TESTIFIED

FOR THE PURPOSE OF OBTAINING AN ORDER FOR A PRELIMINARY INJUNCTION AGAINST JOHN DISPOSING OF ANY PROPERTY AND, WHILE IN COLES COUNTY, MADE NO EFFORT TO CONTACT DANNY.

KATHRYN ASSERTS THAT SHE DID NOT CONTACT DANNY BECAUSE HER PREVIOUS ATTORNEY ADVISED HER NOT TO SPEAK WITH JOHN. DANNY WAS NOT CAPABLE OF PICKING UP THE PHONE AT THAT TIME. KATHRYN ALSO ASSERTS THAT SHE WAS AFRAID OF JOHN AND, THEREFORE, DID NOT VISIT DANNY AS OFTEN AS SHE WOULD HAVE LIKED.

JESSE THOMPSON WAS A FRIEND AND COWORKER OF JOHN THOMPSON AT THE H & F TRUCKING COMPANY. HE TESTIFIED THAT HE SAW A SIGNIFICANT IMPROVEMENT IN DANNY'S HEALTH AND THAT HE (JESSE) OBSERVED A VERY WARM AND LOVING FATHER-SON RELATIONSHIP.

MR. JAMES COLLIN, A CONTRACTOR WHO WAS WORKING ON RENOVATIONS IN JOHN'S HOME, TESTIFIED THAT DURING THAT SPRING AND SUMMER OF 1980 HE OBSERVED DANNY AS A NORMAL CHILD

AND THAT DANNY AND JOHN OFTEN WOULD SIT AND PLAY THE BANJO AND GAMES TOGETHER AND THAT THEY SEEMED TO HAVE A GOOD RELATIONSHIP.

KATHY BEAN, OPERATOR OF A LOCAL RESTAURANT IN MATTOON, CAME TO KNOW JOHN AND DANNY THOMPSON AS CUSTOMERS. SHE TESTIFIED THAT DURING THAT SPRING AND SUMMER SHE OBSERVED A CHILD WHO BECAME MORE SURE OF HIMSELF AS TIME WENT ON, AND THAT HE SEEMED POLITE, CLEAN AND WELL ADJUSTED. SHE DESCRIBED HIM AS "A VERY ROBUST, SHINING LITTLE BOY." SHE BELIEVED THAT JOHN WAS CRAZY ABOUT DANNY.

REVEREND RICHARD ANDERSON CAME TO KNOW JOHN AND DANNY THROUGH THE LOXA PRESBYTERIAN CHURCH IN MATTOON. ACCORDING TO REV. ANDERSON THEY ATTENDED SERVICES FROM JANUARY THROUGH JUNE OF 1980, AND HE FELT JOHN WAS CONSCIENTIOUS ABOUT DANNY'S PROPER RELIGIOUS TRAINING AND THAT JOHN AND DANNY EXHIBITED A SINCERE AND CARING ATTITUDE TOWARDS ONE ANOTHER.

One neighbor who knew John and Kathryn when they were residing together in Lerna testified that Kathryn had told her on one occasion that she would be glad when Danny got bigger because it was hard for her to cope with a little baby. John also testified as to Kathryn's supervision of the child. According to John, on one occasion he found Daniel unsupervised in the yard playing with scissors, and on another occasion unattended in the bathtub. John also testified that Kathryn would punish Danny for crying.

Barbara Hart testified that on one occasion Danny was left crying for about 45 minutes until he finally fell asleep. Ms. Hart also indicated that during the summer and early fall of 1979, Danny was overwrought, wore ill-fitting clothing and improperly pinned diapers, and ate food not properly prepared.

Ms. Hart also testified as to Danny's

CONDITION WHEN JOHN AND DANNY RETURNED TO LERNA. MS. HART OBSERVED A CHANGE IN DANNY. SHE TESTIFIED THAT HE CAME OUT OF HIS SHELL, THAT HIS CLOTHES FIT, AND THAT HE WAS PROPERLY DRESSED.

JOHN TESTIFIED THAT HE CONTINUED HIS EMPLOYMENT WITH H & F TRUCKING UNTIL JUNE OF 1980 AT WHICH TIME HE ACCEPTED EMPLOYMENT WITH ADVANCE TRANSPORT IN EFFINGHAM, ILLINOIS. THERE WAS ALSO TESTIMONY FROM JOHN'S EMPLOYER AT H & F TRUCKING THAT, WHILE JOHN RESIGNED, HE (JOHN) SOUGHT TO RETURN TO H & F TRUCKING BEFORE HE ACCEPTED EMPLOYMENT WITH ADVANCE TRANSPORT, BUT HE WAS NOT REHIRED. THE EMPLOYER AT H & F TRUCKING TESTIFIED THAT JOHN TOOK VARIOUS SALVAGE ITEMS AND DISTRIBUTED THEM AMONGST HIS FRIENDS.

HE WORKED FOR ADVANCE TRANSPORT UNTIL AUGUST OF 1980 AND, THEREAFTER, BEGAN EMPLOYMENT WITH COMPLETE AUTO TRANSPORT IN OCTOBER, WHERE HE WAS EMPLOYED AT THE TIME OF THE HEAR-

ING.

AT THE TIME OF THE HEARING, JOHN AND DANNY LIVED IN HIGHLAND, ILLINOIS, IN A TEN-YEAR-OLD, THREE-BEDROOM HOME ON APPROXIMATELY ONE ACRE OF LAND. ACCORDING TO JOHN, A HOSPITAL AND DAYCARE CENTER WERE NEARBY AND HE HAD MADE ARRANGEMENTS FOR DANNY TO BEGIN KINDERGARTEN. JOHN TESTIFIED THAT HE HAS SEEN TO THE PROPER RELIGIOUS EDUCATION OF DANNY.

ACCORDING TO JOHN HE HAS SPENT ALL OF HIS TIME, WHEN NOT AT WORK, WITH DANNY.

THE APPELLATE COURT, IN A RULE 23 ORDER, FOUND THAT BECAUSE THE COUNSEL FOR KATHRYN DID NOT RAISE THE ISSUE TIMELY, THE ISSUE OF WHETHER THE CIRCUIT COURT OF COLES COUNTY HAD IMPROPERLY EXERCISED ITS JURISDICTION HAD BEEN WAIVED. WHILE WE DO NOT DEEM A QUESTION OF JURISDICTION TO BE WAIVED, WE DO FIND THAT THE CIRCUIT COURT ACTED PROPERLY IN REJECTING AN UNTIMELY REQUEST FOR DEFERRAL

TO A TRIAL COURT IN MICHIGAN.

COUNSEL DID NOT ASK THE CIRCUIT COURT TO CONSIDER DEFERRING THE CASE UNTIL CLOSING ARGUMENTS WERE BEING MADE ON JANUARY 21, 1981, MORE THAN A YEAR AFTER THE CASE HAD BEGUN.

THE UNIFORM CHILD CUSTODY JURISDICTION ACT (ILL. REV. STAT. 1979, CH. 40, PAR. 2101 ET SEQ.) PROVIDES GUIDELINES TO AVOID CONFLICT AND COMPETITION WITH COURTS OF OTHER STATES IN DETERMINING MATTERS OF CHILD CUSTODY. WE AGREE WITH THE APPELLATE COURT THAT ONE OF THE PURPOSES OF THE ACT IS TO ASSURE THAT LITIGATION CONCERNING THE CUSTODY OF A CHILD TAKES PLACE IN THE STATE IN WHICH THE CHILD AND HIS OR HER FAMILY HAVE THE CLOSEST CONNECTION. ANOTHER IS TO DETER ABDUCTIONS AND OTHER UNILATERAL REMOVALS OF CHILDREN UNDERTAKEN TO OBTAIN CUSTODY AWARDS. ILL. REV. STAT. 1979, CH. 40, PARS. 2102(3), (5).

SECTION 4(A)(1) OF THE ACT (ILL. REV.

STAT. 1979, CH. 40, PAR. 2104(A)(1)) PROVIDES THAT THE CIRCUIT COURTS HAVE "JURISDICTION" TO MAKE A CHILD-CUSTODY DETERMINATION IF THE STATE IS THE HOME STATE OF THE CHILD AT THE TIME OF THE COMMENCEMENT OF THE PROCEEDING OR HAD BEEN THE CHILD'S HOME STATE WITHIN SIX MONTHS BEFORE COMMENCEMENT OF THE PROCEEDING. HOWEVER, SECTION 9 ALSO PROVIDES THAT "[I]F THE PETITIONER FOR AN INITIAL JUDGMENT HAS WRONGFULLY TAKEN THE CHILD FROM ANOTHER STATE OR HAS ENGAGED IN SIMILAR REPREHENSIBLE CONDUCT THE COURT MAY DECLINE TO EXERCISE JURISDICTION IF THIS IS JUST AND PROPER UNDER THE CIRCUMSTANCES." (EMPHASIS ADDED.) ILL. REV. STAT. 1979, CH. 40, PAR. 2109(A).

WE STRONGLY DISAPPROVE OF JOHN'S CONDUCT IN FORCIBLY OBTAINING PHYSICAL CUSTODY OF DANNY FROM KATHRYN IN MICHIGAN AND RETURNING HIM TO ILLINOIS. JOHN MAINTAINS HE USED DILIGENCE TO DETERMINE WHETHER ANY MICHIGAN

COURT HAD RULED ON THE CHILD'S CUSTODY. REGARDLESS, LIKE THE APPELLATE COURT, WE DEEM JOHN'S ACTIONS TO BE THE TYPE OF CONDUCT SECTION 9(A) WAS DESIGNED TO PREVENT. THE AGGRIEVED SPOUSE IS ABLE TO REQUEST THE FORUM STATE TO DECLINE TO EXERCISE JURISDICTION SO THAT THE WRONGFUL OBTAINING OF CUSTODY WILL NOT DETERMINE THE FORUM FOR THE DECISION. HAD COUNSEL FOR KATHRYN MADE SUCH A REQUEST HERE, BEFORE THE COURT HEARD THE CASE ON THE MERITS IN ITS ENTIRETY, SHE MAY HAVE HAD A VALID CLAIM. HOWEVER, NO SUCH REQUEST WAS MADE IN THE TRIAL COURT UNTIL THE CLOSING ARGUMENTS ON JANUARY 21, 1981, MORE THAN A YEAR LATER.

WE THEREFORE FIND THAT BECAUSE COUNSEL FOR KATHRYN FAILED TO REQUEST DEFERENCE TO THE MICHIGAN COURTS PRIOR TO THE COMMENCEMENT OF THIS PROCEEDING, AND SINCE THE MERITS OF THIS CASE HAD BEEN HEARD PRIOR TO THE REQUEST THAT DEFERENCE BE ENTERTAINED BY THE CIRCUIT

COURT OF COLES COUNTY, THE COURT PROPERLY REJECTED SUCH A CONSIDERATION.

WE NOW ASK IF THE CUSTODY AWARD BY THE TRIAL JUDGE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. WE HAVE RECITED AT LENGTH THE TESTIMONY AT TRIAL, AND WE FEEL THAT A LENGTHY COMMENTARY ON THAT TESTIMONY IS NOT CALLED FOR HERE.

THE RESPONDENT, KATHRYN THOMPSON, ARGUES THAT JARRETT V. JARRETT (1979), 78 ILL. 2D 337, STRONGLY SUPPORTS HER CONTENTION THAT SHE SHOULD BE AWARDED THE CHILD. THE RESPONDENT ASSERTS THAT THE APPELLATE COURT IGNORED THE MANDATE OF JARRETT IN NOT ADDRESSING THE "MORAL TRANSGRESSIONS" OF JOHN. JARRETT V. JARRETT (1979), 78 ILL. 2D 337, IS AUTHORITY FOR THE PROPOSITION THAT A CHILD SHOULD BE PLACED WITH THE PARENT WHO CAN BEST SERVE THAT CHILD. THE JARRETT CASE DOES NOT ESTABLISH A CONCLUSIVE PRESUMPTION THAT, BECAUSE A CUSTODIAL PARENT COHABITATES

WITH A MEMBER OF THE OPPOSITE SEX, THE CHILD IS HARMED. NO SUCH PRESUMPTION EXISTS IN THIS STATE. THE COURT IN JARRETT INDICATED THAT A CUSTODY AWARD IS NOT ARRIVED AT BY PRESSING ONE LEVER AND MECHANICALLY DENYING CUSTODY TO ONE PARENT; RATHER ALL OF THE CIRCUMSTANCES MUST BE CONSIDERED THAT AFFECT THE BEST INTERESTS OF THE CHILD. JARRETT V. JARRETT (1979), 78 ILL. 2D 337, 344-45; ILL. REV. STAT. 1979, CH. 40, PAR. 602.

A CONSIDERABLE NUMBER OF WITNESSES TESTIFIED ON BEHALF OF PETITIONER INDICATING DANNY WAS SICKLY, UNDISCIPLINED AND OVER-WEIGHT PRIOR TO COMING INTO JOHN'S CUSTODY, AND THAT THEREAFTER DANNY IMPROVED, AND A WARM, LOVING RELATIONSHIP DEVELOPED BETWEEN THE FATHER AND THE SON.

THAT IS NOT TO SAY WE CONDONE ALL OF THE FATHER'S CONDUCT. WE DO NOT. WE RECALL MS. COFFMAN'S TESTIMONY THAT THE PETITIONER THREATENED TO REVEAL PICTURES OF HER IN THE

NUDE IF SHE TESTIFIED AGAINST HIM. WHILE SUCH EVIDENCE TROUBLES US A GREAT DEAL, WE HAVE DETERMINED THAT SUCH CONDUCT IS OUTWEIGHED BY THE EVIDENCE PRESENTED WHICH DEMONSTRATES THAT A HEALTHY RELATIONSHIP EXISTED BETWEEN FATHER AND SON AND THAT DANNY WAS DOING WELL IN HIS FATHER'S CUSTODY.

BASED UPON OUR EXHAUSTIVE REVIEW OF THE EVIDENCE, WE FIND THAT THERE HAS BEEN NO SHOWING THAT THE TRIAL COURT JUDGE ABUSED HIS DISCRETION IN AWARDING CUSTODY OF DANNY TO HIS FATHER.

THE RESPONDENT ALSO CONTENDS THAT SHE SHOULD HAVE BEEN PERMITTED TO REOPEN THE CASE PRIOR TO THE ENTRY OF THE JUDGMENT IN THE CASE BUT AFTER THE PROOFS WERE CLOSED, IN ORDER TO ALLOW HER TO INTRODUCE EVIDENCE CONCERNING PETITIONER'S REPUTATION.

IN NOT REOPENING THE CASE TO RECEIVE ADDITIONAL EVIDENCE, THE RESPONDENT CONTENDS THAT THE TRIAL COURT ABUSED ITS DISCRETION.

THE RESPONDENT OFFERS NO SUPPORT FOR HER POSITION, AND WE FIND NONE. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION.

WE FURTHER UPHOLD THE APPELLATE COURT'S JUDGMENT RESPECTING THE PROPERTY DIVISION, INCLUDING ITS REMAND OF THE CAUSE TO THE CIRCUIT COURT OF COLES COUNTY TO REQUIRE THE PETITIONER TO PAY TO RESPONDENT ONE-HALF OF A TAX-REFUND CHECK IN THE SUM OF $742 THAT WAS DUE RESPONDENT. JOHN HAD PREVIOUSLY FORGED KATHRYN'S NAME ON THE BACK OF THE CHECK AND CASHED IT. HE DOES NOT PRESENTLY DISPUTE THAT KATHRYN WAS ENTITLED TO RECEIVE $371 OF THE PROCEEDS OF THAT CHECK.

THE RESPONDENT DID NOT CONTEST IN THIS COURT THE APPELLATE COURT'S APPROVAL OF THE CIRCUIT COURT'S SUSTAINING OF THE OBJECTION TO HER OFFER OF PROOF OF THE PETITIONER'S REPUTATION.

ACCORDINGLY, THE JUDGMENT OF THE APPELLATE COURT IS AFFIRMED.

JUDGMENT AFFIRMED.

JUSTICE MORAN, SPECIALLY CONCURRING:

I CONCUR IN THE JUDGMENT REACHED BY THE MAJORITY; HOWEVER, I DO NOT CONCUR IN THE STATEMENT "THE JARRETT CASE DOES NOT ESTABLISH A CONCLUSIVE PRESUMPTION THAT, BECAUSE A CUSTODIAL PARENT COHABITATES WITH A MEMBER OF THE OPPOSITE SEX, THE CHILD IS HARMED." (EMPHASIS ADDED.) (SLIP OP. AT 8.) IN MY OPINION, JARRETT DID ESTABLISH A CONCLUSIVE PRESUMPTION. SEE THE DISSENT IN JARRETT V. JARRETT (1979), 78 ILL. 2D 337, 352-53 (MORAN, J., AND GOLDENHERSH, C.J., DISSENTING), AND ALSO THE DISSENT OF JUSTICE BRENNAN, JOINED BY JUSTICE MARSHALL, FROM DENIAL OF THE WRIT OF CERTIORARI IN JARRETT V. JARRETT (1980), 449 U.S. 927, 66 L. ED. 2D 155, 101 S. CT. 329.

JUSTICE UNDERWOOD, DISSENTING:

I BELIEVE THE TRIAL JUDGE ABUSED HIS DISCRETION IN DENYING THE MOTHER'S PREJUDG-

MENT MOTION TO REOPEN THE PROOFS AND PRESENT ADDITIONAL EVIDENCE.

THE MAJORITY OPINION NOTES THE FATHER'S ILLICIT AFFAIRS, ABDUCTION OF DANNY, AND THREATS TO THE POTENTIAL WITNESS, BUT DOES NOT MENTION SEVERAL OTHER MATTERS WHICH, IF TRUE, SEEM TO ME QUITE SIGNIFICANT. IT IS ASSERTED THAT THE FATHER HAS TWO CHILDREN BY A PRIOR MARRIAGE, A DAUGHTER WHOM HE HAS NOT SEEN IN NINE YEARS AND A SON WHOM HE HAS NEVER SEEN; THAT HE IS UNDER A COURT ORDER TO PAY $100 WEEKLY FOR THEIR SUPPORT; THAT SINCE THE HEARING HE HAS LOST THE EMPLOYMENT HE HELD AT THAT TIME; AND THAT HE HAS INSTITUTED BANKRUPTCY PROCEEDINGS. CERTAINLY PROOF OF THESE FACTS WOULD BE PERSUASIVE ON THE QUESTIONS OF CUSTODY AND THE FATHER'S ABILITY TO SUPPORT THE CHILD.

THE DISSENTING APPELLATE COURT JUSTICE BELIEVED THE TRIAL COURT'S AWARD OF CUSTODY TO THE FATHER WAS CONTRARY TO THE MANIFEST

WEIGHT OF THE EVIDENCE, A POSITION WITH WHICH I AM INCLINED TO AGREE. THE MOTHER DENIED OR GAVE RATIONAL EXPLANATIONS FOR THE OCCURRENCES RECITED BY THE MAJORITY IN SUPPORT OF THE RESULT IT REACHES. FOR EXAMPLE, THE ABSENCE OF MITTENS WAS DUE TO THE FACT THAT THEY WERE TORN FROM THE BOY'S HANDS DURING THE STRUGGLE AT THE TIME HE WAS ABDUCTED BY THE FATHER. THE ABSENCE OF MORE FREQUENT CONTACTS BY THE MOTHER WAS DUE, SHE TESTIFIED, TO HER ATTORNEY'S ADVICE AND HER FEAR OF THE FATHER, A FEAR SHARED BY AT LEAST ONE OF THE FATHER'S SEXUAL PARTNERS.

I BELIEVE THE ADDITIONAL EVIDENCE THE MOTHER SEEKS TO OFFER MAY WELL TIP THE SCALES MORE CLEARLY IN HER FAVOR. CONSEQUENTLY, I WOULD REVERSE THE CIRCUIT AND APPELLATE COURTS AND REMAND THE CAUSE TO THE CIRCUIT COURT FOR RECONSIDERATION IN THE LIGHT OF SUCH ADDITIONAL EVIDENCE AS MAY BE PRESENTED.

JUSTICE GOLDENHERSH JOINS IN THIS DISSENT.

36 ILL. DEC.1

78 ILL. 2D 337

400 N.E.2D 421

JACQUELINE JARRETT, APPELLEE,

V.

WALTER JARRETT, APPELLANT.

No. 51431

SUPREME COURT OF ILLINOIS.

DEC. 20, 1979.

REHEARING DENIED FEB. 1, 1980.

UNDERWOOD, JUSTICE:

ON DECEMBER 6, 1976, JACQUELINE JARRETT RECEIVED A DIVORCE FROM WALTER JARRETT IN THE CIRCUIT COURT OF COOK COUNTY ON GROUNDS OF EXTREME AND REPEATED MENTAL CRUELTY. THE DIVORCE DECREE, BY AGREEMENT, ALSO AWARDED JACQUELINE CUSTODY OF THE THREE JARRETT CHILDREN SUBJECT TO THE FATHER'S RIGHT OF VISITATION AT REASONABLE TIMES.

SEVEN MONTHS LATER, ALLEGING CHANGED CONDITIONS, WALTER PETITIONED THE CIRCUIT COURT TO MODIFY THE DIVORCE DECREE AND AWARD HIM CUSTODY OF THE CHILDREN. THE CIRCUIT COURT GRANTED HIS PETITION SUBJECT TO THE MOTHER'S RIGHT OF VISITATION AT REASONABLE TIMES, BUT A MAJORITY OF THE APPELLATE COURT REVERSED (64 ILL. APP. 3D 932, 21 ILL. DEC. 718, 382 N.E. 2D 12), AND WE GRANTED LEAVE TO APPEAL.

DURING THEIR MARRIAGE, WALTER AND JACQUELINE HAD THREE DAUGHTERS, WHO, AT THE TIME OF THE DIVORCE, WERE 12, 10 AND 7 YEARS OLD. IN ADDITION TO CUSTODY OF THE CHILDREN, THE DIVORCE DECREE ALSO AWARDED JACQUELINE THE USE OF THE FAMILY HOME, AND CHILD SUPPORT; WALTER RECEIVED VISITATION RIGHTS AT ALL REASONABLE TIMES AND USUALLY HAD THE CHILDREN FROM SATURDAY EVENING TO SUNDAY EVENING. IN APRIL 1977, FIVE MONTHS AFTER THE DIVORCE, JACQUELINE INFORMED WALTER THAT SHE PLANNED TO HAVE HER BOYFRIEND, WAYNE HAMMON, MOVE INTO

THE FAMILY HOME WITH HER. WALTER PROTESTED, BUT HAMMON MOVED IN ON MAY 1, 1977. JACQUELINE AND HAMMON THEREAFTER COHABITED IN THE JARRETT HOME BUT DID NOT MARRY.

THE CHILDREN, WHO WERE NOT "OVERLY ENTHUSED" WHEN THEY FIRST LEARNED THAT HAMMON WOULD MOVE INTO THE FAMILY HOME WITH THEM, ASKED JACQUELINE IF SHE INTENDED TO MARRY HAMMON, BUT JACQUELINE RESPONDED THAT SHE DID NOT KNOW. AT THE MODIFICATION HEARING JACQUELINE TESTIFIED THAT SHE DID NOT WANT TO REMARRY BECAUSE IT WAS TOO SOON AFTER HER DIVORCE; BECAUSE SHE DID NOT BELIEVE THAT A MARRIAGE LICENSE MAKES A RELATIONSHIP; AND BECAUSE THE DIVORCE DECREE REQUIRED HER TO SELL THE FAMILY HOME WITHIN SIX MONTHS AFTER REMARRIAGE. SHE DID NOT WANT TO SELL THE HOUSE BECAUSE THE CHILDREN DID NOT WANT TO MOVE AND SHE COULD NOT AFFORD TO DO SO. JACQUELINE EXPLAINED TO THE CHILDREN THAT SOME PEOPLE THOUGHT IT WAS WRONG FOR AN

UNMARRIED MAN AND WOMAN TO LIVE TOGETHER BUT SHE THOUGHT THAT WHAT MATTERED WAS THAT THEY LOVED EACH OTHER. JACQUELINE TESTIFIED THAT SHE TOLD SOME NEIGHBORS THAT HAMMON WOULD MOVE IN WITH HER BUT THAT SHE HAD NOT RECEIVED ANY ADVERSE COMMENTS. JACQUELINE FURTHER TESTIFIED THAT THE CHILDREN SEEMED TO DEVELOP AN AFFECTIONATE RELATIONSHIP WITH HAMMON, WHO PLAYED WITH THEM, HELPED THEM WITH THEIR HOMEWORK, AND VERBALLY DISCIPLINED THEM. BOTH JACQUELINE AND HAMMON TESTIFIED AT THE HEARING THAT THEY DID NOT AT THAT TIME HAVE ANY PLANS TO MARRY. IN ORAL ARGUMENTS BEFORE THIS COURT JACQUELINE'S COUNSEL CONCEDED THAT SHE AND HAMMON WERE STILL LIVING TOGETHER UNMARRIED.

WALTER JARRETT TESTIFIED THAT HE THOUGHT JACQUELINE'S LIVING ARRANGEMENTS CREATED A MORAL ENVIRONMENT WHICH WAS NOT A PROPER ONE IN WHICH TO RAISE THREE YOUNG GIRLS. HE ALSO TESTIFIED THAT THE CHILDREN

WERE ALWAYS CLEAN, HEALTHY, WELL DRESSED AND WELL NOURISHED WHEN HE PICKED THEM UP, AND THAT WHEN HE TALKED WITH HIS OLDEST DAUGHTER, KATHLEEN, SHE DID NOT OBJECT TO JACQUELINE'S LIVING ARRANGEMENT.

THE CIRCUIT COURT FOUND THAT IT WAS "NECESSARY FOR THE MORAL AND SPIRITUAL WELL-BEING AND DEVELOPMENT" OF THE CHILDREN THAT WALTER RECEIVE CUSTODY. IN REVERSING, THE APPELLATE COURT REASONED THAT THE RECORD DID NOT REVEAL ANY NEGATIVE EFFECTS ON THE CHILDRED CAUSED BY JACQUELINE'S COHABITATION WITH HAMMON, AND THAT THE CIRCUIT COURT HAS NOT FOUND JACQUELINE UNFIT. IT DECLINED TO CONSIDER POTENTIAL FUTURE HARMFUL EFFECTS OF THE COHABITATION ON THE CHILDREN. 64 ILL. APP.3D 932, 937, 21 ILL. DEC. 718, 382 N.E. 2D 12.

BOTH PARTIES TO THIS LITIGATION HAVE RELIED ON SECTIONS 602 AND 610 OF THE NEW ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE

ACT (ILL. REV. STAT. 1977, CH. 40, PARS. 602, 610), WHICH PROVIDE:

"SEC. 602. BEST INTEREST OF CHILD.

(A) THE COURT SHALL DETERMINE CUSTODY IN ACCORDANCE WITH THE BEST INTEREST OF THE CHILD. THE COURT SHALL CONSIDER ALL RELEVANT FACTORS INCLUDING:

(1) THE WISHES OF THE CHILD'S PARENT OR PARENTS AS TO HIS CUSTODY;

(2) THE WISHES OF THE CHILD AS TO HIS CUSTODIAN;

(3) THE INTERACTION AND INTERRELATIONSHIP OF THE CHILD WITH HIS PARENT OR PARENTS, HIS SIBLINGS AND ANY OTHER PERSON WHO MAY SIGNIFICANTLY AFFECT THE CHILD'S BEST INTEREST;

(4) THE CHILD'S ADJUSTMENT TO HIS HOME, SCHOOL AND COMMUNITY; AND

(5) THE MENTAL AND PHYSICAL HEALTH OF ALL INDIVIDUALS INVOLVED.

(B) THE COURT SHALL NOT CONSIDER CONDUCT OF A PRESENT OR PROPOSED CUSTODIAN THAT DOES NOT AFFECT HIS RELATIONSHIP TO THE CHILD."

"SEC. 610. MODIFICATION.

(A) NO MOTION TO MODIFY A CUSTODY JUDGMENT MAY BE MADE EARLIER THAN 2 YEARS AFTER ITS DATE, UNLESS THE COURT PERMITS IT TO BE MADE ON THE BASIS OF AFFIDAVITS THAT THERE IS REASON TO BELIEVE THE CHILD'S PRESENT ENVIRONMENT MAY ENDANGER SERIOUSLY HIS PHYSICAL, MENTAL, MORAL OR EMOTIONAL HEALTH.

(B) THE COURT SHALL NOT MODIFY A PRIOR CUSTODY JUDGMENT UNLESS IT FINDS, UPON THE BASIS OF FACTS THAT HAVE ARISEN SINCE THE PRIOR JUDGMENT OR THAT WERE UNKNOWN TO THE COURT AT THE TIME OF ENTRY OF THE PRIOR JUDGMENT, THAT A CHANGE HAS OCCURRED IN THE CIRCUMSTANCES OF THE CHILD OR HIS CUSTODIAN AND THAT THE MODIFICATION IS NECESSARY TO SERVE THE BEST INTEREST OF THE CHILD. IN APPLYING THESE STANDARDS THE COURT SHALL RETAIN THE

CUSTODIAN APPOINTED PURSUANT TO THE PRIOR JUDGMENT UNLESS:

* * * * * * * * * * *

(3) THE CHILD'S PRESENT ENVIRONMENT ENDANGERS SERIOUSLY HIS PHYSICAL, MENTAL, MORAL OR EMOTIONAL HEALTH AND THE HARM LIKELY TO BE CAUSED BY A CHANGE OF ENVIRONMENT IS OUTWEIGHED BY ITS ADVANTAGES TO HIM.

(c) * * * "

WE NOTE INITIALLY, HOWEVER, THAT THIS APPEAL FROM THE CUSTODY MODIFICATION ORDER WAS TAKEN ON AUGUST 11, 1977, TWO MONTHS BEFORE THE EFFECTIVE DATE OF THE NEW ACT, AND THAT THE NEW ACT EXPRESSLY PROVIDES THAT PRIOR LAW SHALL GOVERN SUCH AN APPEAL (ILL. REV. STAT. 1977, CH. 40, PAR. 801(D)). WHILE THE SECTIONS OF THE NEW ACT GOVERNING MODIFICATION OF CUSTODY ORDERS REQUIRE EXPLICIT FINDINGS (SEE IN RE CUSTODY OF HARNE 1979), 77 ILL. 2D 414, 33 ILL. DEC. 110, 396 N.E.2D 499), WE BELIEVE THOSE SECTIONS IN SUBSTANCE

CODIFY THE PRIOR DECISIONAL LAW, AND THAT OUR DECISION IN THIS APPEAL IS NOT AFFECTED BY THE APPLICABILITY OR NONAPPLICABILITY OF THE NEW ACT.

THE STANDARDS APPLICABLE TO PETITIONS FOR MODIFICATION OF CUSTODY APPEARING IN SECTION 610(B) ARE SUBSTANTIALLY THOSE TO WHICH ILLINOIS COURTS HAVE LONG ADHERED. IN NYE V. NYE (1952), 411 ILL. 408, 416, 105 N.E. 2D 300, 304, THIS COURT SAID THAT A DIVORCE DECREE "IS RES JUDICATA AS TO THE FACTS WHICH EXISTED AT THE TIME IT WAS ENTERED" AND THAT "[N]EW CONDITIONS MUST HAVE ARISEN TO WARRANT THE COURT CHANGING ITS PRIOR CUSTODY DETERMINATION." MOREOVER, THE GUIDING PRINCIPLE IN CUSTODY ADJUDICATIONS IS THE BEST INTERESTS OF THE CHILD (411 ILL. 408, 415, 105 N.E. 2D 300) AND THE CHANGE IN CONDITIONS MUST ADVERSELY AFFECT THE BEST INTERESTS OF THE CHILD (411 ILL. 408, 416, 105 N.E. 2D 300). THE PRIOR STATUTE ALSO

DIRECTED THE ATTENTION OF THE COURT TO THE INTERESTS OF THE CHILD IN CUSTODY ADJUDICATION. (SECTIONS 13 AND 18 OF THE DIVORCE ACT (ILL. REV. STAT. 1975, CH. 40, PARS. 14, 19), REPEALED BY THE ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT (ILL. REV. STAT. 1977, CH. 40, PARS. 101 TO 802.) ALTHOUGH PRIOR ILLINOIS DECISIONS DID NOT EXPLICITLY ARTICULATE THE NEW ACT'S COMMAND THAT NO CHANGE BE MADE IN CUSTODY UNLESS THE HARM INHERENT IN ANY CHANGE IN CUSTODY IS OUTWEIGHED BY THE ADVANTAGES TO THE CHILD OF THE NEW ENVIRONMENT, THEY DID RECOGNIZE THAT CONTINUITY IN THE CHILD'S ENVIRONMENT IS IN ITSELF IMPORTANT. (BERGAN V. BERGAN (1976), 42 ILL. APP. 3D 740, 743, 1 ILL. DEC. 485, 356 N.E. 2D 673; HOLLOWAY V. HOLLOWAY (1973), 10 ILL. APP. 3D 662, 665, 294 N.E. 2D 759; COLLINGS V. COLLINGS (1970), 120 ILL. APP. 2D 125, 128, 256 N.E. 2D 108; JENKINS V. JENKINS (1967), 81 ILL. APP. 2D 67, 72, 74, 225 N.E.

2D 698; LEARY V. LEARY (1965), 61 ILL. APP. 2D 152, 155, 209 N.E. 2D 663). FINALLY, THE COMMANDS OF SECTIONS 602 AND 610 OF THE NEW ACT TO CONSIDER ONLY WHETHER THE CHILD'S ENVIRONMENT ENDANGERS HIS PHYSICAL, MENTAL, MORAL AND EMOTIONAL HEALTH (ILL. REV. STAT. 1977, CH. 40, PAR. 610) AND TO DISREGARD ANY CONDUCT OF THE CUSTODIAN THAT DOES NOT AFFECT HIS RELATIONSHIP WITH THE CHILD (ILL. REV. STAT. 1977, CH. 40, PAR. 602) REEMPHASIZE THE PRINCIPLE STATED IN NYE V. NYE (1952), 411 ILL. 408, 105 N.E. 2D 300, THAT THE FOCUS OF CUSTODY DETERMINATIONS MUST BE THE WELFARE OF THE CHILD.

[1] THE CHIEF ISSUE IN THIS CASE IS WHETHER A CHANGE OF CUSTODY PREDICATED UPON THE OPEN AND CONTINUING COHABITATION OF THE CUSTODIAL PARENT WITH A MEMBER OF THE OPPOSITE SEX IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE IN THE ABSENCE OF ANY TANGIBLE EVIDENCE OF CONTEMPORANEOUS ADVERSE

EFFECT UPON THE MINOR CHILDREN. CONSIDERING THE PRINCIPLES PREVIOUSLY ENUNCIATED, AND THE STATUTORY PROVISIONS, AND PRIOR DECISIONS OF THE COURTS OF THIS STATE, WE CONCLUDE THAT UNDER THE FACTS IN THIS CASE THE TRIAL COURT PROPERLY TRANSFERRED CUSTODY OF THE JARRETT CHILDREN FROM JACQUELINE TO WALTER JARRETT.

THE RELEVANT STANDARDS OF CONDUCT ARE EXPRESSED IN THE STATUTES OF THIS STATE: SECTION 11-8 OF THE CRIMINAL CODE OF 1961 (ILL. REV. STAT. 1977, CH. 38, PAR. 11-8) PROVIDES THAT "[A]NY PERSON WHO COHABITS OR HAS SEXUAL INTERCOURSE WITH ANOTHER NOT HIS SPOUSE COMMITS FORNICATION IF THE BEHAVIOR IS OPEN AND NOTORIOUS." IN HEWITT V. HEWITT (1979), 77 ILL. 2D 49, 61-62, 31 ILL. DEC. 827, 394 N.E. 2D 1204, WE EMPHASIZED THE REFUSAL OF THE GENERAL ASSEMBLY IN ENACTING THE NEW ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT (ILL. REV. STAT. 1977, CH. 40,

PAR 101 ET SEQ.) TO SANCTION ANY NONMARITAL RELATIONSHIPS AND ITS DECLARATION OF THE PURPOSE TO "STRENGTHEN AND PRESERVE THE INTEGRITY OF MARRIAGE AND SAFEGUARD FAMILY RELATIONSHIPS" (ILL. REV. STAT. 1977, CH. 40, PAR. 102(2)).

JACQUELINE ARGUES, HOWEVER, THAT HER CONDUCT DOES NOT AFFRONT PUBLIC MORALITY BECAUSE SUCH CONDUCT IS NOW WIDELY ACCEPTED, AND CITES 1978 CENSUS BUREAU STATISTICS THAT SHOW 1.1 MILLION HOUSEHOLDS COMPOSED OF AN UNMARRIED MAN AND WOMAN, CLOSE TO A QUARTER OF WHICH ALSO INCLUDE AT LEAST ONE CHILD. THIS IS ESSENTIALLY THE SAME ARGUMENT WE REJECTED LAST TERM IN HEWITT V. HEWITT (1979), 77 ILL. 2D 49, 31 ILL. DEC. 827, 394 N.E. 2D 1204, AND IT IS EQUALLY UNPERSUASIVE HERE. THE NUMBER OF PEOPLE LIVING IN SUCH HOUSEHOLDS FORMS ONLY A SMALL PERCENTAGE OF THE ADULT POPULATION, BUT MORE TO THE POINT, THE STATUTORY INTERPRETATION URGED UPON US

BY JACQUELINE SIMPLY NULLIFIES THE FORNICATION STATUTE. THE LOGICAL CONCLUSION OF HER ARGUMENT IS THAT THE STATUTORY PROHIBITIONS ARE VOID AS TO THOSE WHO BELIEVE THE PROSCRIBED ACTS ARE NOT IMMORAL, OR, FOR ONE REASON OR ANOTHER, NEED NOT BE HEEDED. SO STATED, OF COURSE, THE ARGUMENT DEFEATS ITSELF. THE RULES WHICH OUR SOCIETY ENACTS FOR THE GOVERNANCE OF ITS MEMBERS ARE NOT LIMITED TO THOSE WHO AGREE WITH THOSE RULES -- THEY ARE EQUALLY BINDING ON THE DISSENTERS. THE FORNICATION STATUTE AND THE ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT EVIDENCE THE RELEVANT MORAL STANDARDS OF THIS STATE, AS DECLARED BY OUR LEGISLATURE. THE OPEN AND NOTORIOUS LIMITATION ON THE FORMER'S PROHIBITIONS REFLECTS BOTH A DISINCLINATION TO CRIMINALIZE PURELY PRIVATE RELATIONSHIPS AND A RECOGNITION THAT OPEN FORNICATION REPRESENTS A GRAVER THREAT TO PUBLIC MORALITY THAN PRIVATE VIOLATIONS. CONDUCT OF THAT NATURE,

WHEN IT IS OPEN, NOT ONLY VIOLATES THE STATUTORILY EXPRESSED MORAL STANDARDS OF THE STATE, BUT ALSO ENCOURAGES OTHERS TO VIOLATE THOSE STANDARDS, AND DEBASES PUBLIC MORALITY. WHILE WE AGREE THAT THE STATUTE DOES NOT PENALIZE CONDUCT WHICH IS ESSENTIALLY PRIVATE AND DISCREET (PEOPLE v. CESSNA (1976), 42 ILL. APP. 3D 746, 749, 1 ILL. DEC. 433, 356 N.E. 2D 621), JACQUELINE'S CONDUCT HAS BEEN NEITHER, FOR SHE HAS DISCUSSED THIS RELATIONSHIP AND HER RATIONALIZATION OF IT WITH AT LEAST HER CHILDREN, HER FORMER HUSBAND AND HER NEIGHBORS. IT IS, IN OUR JUDGMENT, CLEAR THAT HER CONDUCT OFFENDS PREVAILING PUBLIC POLICY. LYMAN v. PEOPLE (1902), 198 ILL. 544, 549-50, 64 N.E. 974; SEARLS v. PEOPLE (1852), 13 ILL. 597, 598; PEOPLE v. POTTER (1943), 319 ILL. APP. 409, 410-11, 416, 49 N.E. 2D 307.

JACQUELINE'S DISREGARD FOR EXISTING STANDARDS OF CONDUCT INSTRUCTS HER CHILD-

REN, BY EXAMPLE, THAT THEY, TOO, MAY IGNORE THEM (SEE STARK V. STARK (1973), 13 ILL. APP. 3D 35, 299 N.E.2D 605; BROWN VS. BROWN, (1977), 218 VA. 196, 237 S.E. 2D 89), AND COULD WELL ENCOURAGE THE CHILDREN TO ENGAGE IN SIMILAR ACTIVITY IN THE FUTURE. THAT FACTOR, OF COURSE, SUPPORTS THE TRIAL COURT'S CONCLUSION THAT THEIR DAILY PRESENCE IN THAT ENVIRONMENT WAS INJURIOUS TO THE MORAL WELL-BEING AND DEVELOPMENT OF THE CHILDREN.

IT IS TRUE THAT, AS JACQUELINE ARGUES, THE COURTS HAVE NOT DENIED CUSTODY TO EVERY PARENT WHO HAS VIOLATED THE COMMUNITY'S MORAL STANDARDS, NOR DO WE NOW INTIMATE A DIFFERENT RULE. RATHER THAN MECHANICALLY DENYING CUSTODY IN EVERY SUCH INSTANCE, THE COURTS OF THIS STATE APPRAISE THE MORAL EXAMPLE CURRENTLY PROVIDED AND THE EXAMPLE WHICH MAY BE EXPECTED BY THE PARENT IN THE FUTURE. WE HELD IN NYE V. NYE (1952), 411 ILL. 408, 415, 105 N.E. 2D 300, THAT PAST

MORAL INDISCRETIONS OF A PARENT ARE NOT SUFFICIENT GROUNDS FOR DENYING CUSTODY IF THE PARENT'S PRESENT CONDUCT ESTABLISHES THE IMPROBABILITY OF SUCH LAPSES IN THE FUTURE THIS RULE FOCUSES THE TRIAL COURT'S ATTENTION ON THE MORAL VALUES WHICH THE PARENT IS ACTUALLY DEMONSTRATING TO THE CHILDREN.

SINCE THE DECISION IN NYE, THE APPELLATE COURTS OF THIS STATE HAVE REPEATEDLY EMPHASIZED THIS PRINCIPLE, PARTICULARLY WHEN THE CHILDREN WERE UNAWARE OF THEIR PARENT'S MORAL INDISCRETION. (HENDRICKSON V. HENDRICKSON (1977), 49 ILL. APP. 3D 160, 7 ILL. DEC. 405, 364 N.E. 2D 566; STRAND V. STRAND (1976), 41 ILL. APP. 3D 651, 355 N.E. 2D 47; CHRISTENSEN V. CHRISTENSEN (1975), 31 ILL. APP. 3D 1041, 335 N.E. 2D 581; HUEY V. HUEY (1975), 25 ILL. APP. 3D 20, 322 N.E. 2D 560; MULVIHILL V. MULVIHILL (1974), 20 ILL. APP. 3D 440, 314 N.E. 2D 342; HAHN V. HAHN (1966) 69 ILL. APP. 2D

302, 216 N.E. 2D 229; LEARY V. LEARY (1965), 61 ILL. APP. 2D 152, 209 N.E.2D 663; JAYROE V. JAYROE (1965), 58 ILL. APP. 2D 79, 206 N.E. 2D 266; ARDEN V. ARDEN (1960), 25 ILL. APP. 2D 181, 166 N.E. 2D 111; WOLFRUM V. WOLFRUM (1955), 5 ILL. APP 2D 471, 126 N.E. 2D 34.) AT THE TIME OF THIS HEARING, HOWEVER, AND EVEN WHEN THIS CASE WAS ARGUED ORALLY TO THIS COURT, JACQUELINE CONTINUED TO COHABIT WITH WAYNE HAMMON AND HAD DONE NOTHING TO INDICATE THAT THIS RELATIONSHIP WOULD NOT CONTINUE IN THE FUTURE. THUS THE MORAL VALUES WHICH JACQUELINE CURRENTLY REPRESENTS TO HER CHILDREN, AND THOSE WHICH SHE MAY BE EXPECTED TO PORTRAY TO THEM IN THE FUTURE, CONTRAVENE STATUTORILY DECLARED STANDARDS OF CONDUCT AND ENDANGER THE CHILDREN'S MORAL DEVELOPMENT.

JACQUELINE ARGUES, HOWEVER, THAT THREE RECENT CASES -- BURRIS V. BURRIS (1979),

70 Ill. App. 3d 503, 26 Ill. Dec. 810, 388 N.E. 2d 811; In re Marriage of Farris (1979), 69 Ill. App. 3d 1042, 26 Ill. Dec. 608, 388 N.E. 2d 232, and Rippon v. Rippon (1978), 64 Ill. App. 3d 465, 21 Ill. Dec. 135, 381 N.E. 2d 70 -- indicate that the moral indiscretion of a parent is not sufficient ground for denial of custody. In Rippon the mother who had committed the indiscretion planned to marry her paramour and there was no indication of future misconduct. Rippon therefore falls within the rule set out in Nye. Both Farris and Burris were rendered after, and relied upon, the Appellate Decisions in this case (64 Ill. App. 3d 932, 21 Ill. Dec. 718, 382 N.E.2d 12) and in Hewitt v. Hewitt (1978), 62 Ill. App. 3d 861, 20 Ill. Dec. 476, 380 N.E.2d 454, both of which we have now reversed.

Jacqueline also argues, and the

Appellate Court agreed (64 Ill. App. 3d 932, 937, 21 Ill. Dec. 718, 382 N.E. 2d 12), that the Trial Court's decision to grant custody of the children to Walter Jarrett was an improper assertion by the Trial Judge of his own personal moral beliefs. She further argues that the assertion of moral values in this case, as in Hewitt v. Hewitt (1979), 77 Ill. 2d 49, 31 Ill. Dec. 827, 394 N.E. 2d 1204, is a task more appropriately carried out by the legislature. As pointed out earlier, however, it is the legislature which has established the standards she has chosen to ignore, and the action of the Trial Court merely implemented principles which have long been followed in this State.

The mother agrues, too, that Section 610 of the Illinois Marriage and Dissolution of Marriage Act (Ill. Rev. Stat. 1977,

CH. 40, PAR. 610) REQUIRES THE TRIAL COURT TO REFRAIN FROM MODIFYING A PRIOR CUSTODY DECREE UNLESS IT FINDS THAT THE CHILDREN HAVE SUFFERED ACTUAL TANGIBLE HARM. THE STATUTE, HOWEVER, DIRECTS THE TRIAL COURT TO DETERMINE WHETHER "THE CHILD'S PRESENT ENVIRONMENT ENDANGERS SERIOUSLY HIS PHYSICAL, MENTAL, MORAL OR EMOTIONAL HEALTH." (EMPHASIS ADDED.) (ILL. REV. STAT. 1977, CH. 40, PAR. 610 (B)(3).) IN SOME CASES, PARTICULARLY THOSE INVOLVING PHYSICAL HARM, IT MAY BE APPROPRIATE FOR THE TRIAL COURT TO DETERMINE WHETHER THE CHILD IS ENDANGERED BY CONSIDERING EVIDENCE OF ACTUAL HARM. IN CASES SUCH AS THIS ONE, HOWEVER, SUCH A NARROW INTERPRETATION OF THE STATUTE WOULD DEFEAT ITS PURPOSE. AT THE TIME OF THE HEARING THE THREE JARRETT CHILDREN, WHO WERE THEN 12, 10 AND 7 YEARS OLD, WERE OBVIOUSLY INCAPABLE OF EMULATING THEIR MOTHER'S MORAL INDISCRETIONS. TO WAIT

UNTIL LATER YEARS TO DETERMINE WHETHER JACQUELINE HAD INCULCATED HER MORAL VALUES IN THE CHILDREN WOULD BE TO AWAIT A DEMONSTRATION THAT THE VERY HARM WHICH THE STATUTE SEEKS TO AVOID HAD OCCURRED. MEASURES TO SAFEGUARD THE MORAL WELL-BEING OF CHILDREN, WHOSE LIVES HAVE ALREADY BEEN DISRUPTED BY THE DIVORCE OF THEIR PARENTS, CANNOT HAVE BEEN INTENDED TO BE DELAYED UNTIL THERE ARE TANGIBLE MANIFESTATIONS OF DAMAGE TO THEIR CHARACTER.

WHILE OUR COMMENTS HAVE FOCUSED UPON THE MORAL HAZARDS, WE ARE NOT CONVINCED THAT OPEN COHABITATION DOES NOT ALSO AFFECT THE MENTAL AND EMOTIONAL HEALTH OF THE CHILDREN. JACQUELINE'S TESTIMONY AT THE HEARING INDICATED THAT WHEN HER CHILDREN ORIGINALLY LEARNED THAT WAYNE HAMMON WOULD MOVE IN WITH THEM, THEY INITIALLY EXPECTED THAT SHE WOULD MARRY HIM. IT IS DIFFICULT TO PREDICT WHAT PHYCHOLOGICAL EFFECTS OR PROB-

LEMS MAY LATER DEVELOP FROM THEIR EFFORTS TO OVERCOME THE DISPARITY BETWEEN THEIR CONCEPTS OF PROPRIETY AND THEIR MOTHER'S CONDUCT. (GEHN V. GEHN (1977), 51 ILL. APP. 3D 946, 949, 10 ILL. DEC. 120, 367 N.E. 2D 508.) NOR WILL THEIR ATTEMPTS TO ADJUST TO THIS NEW ENVIRONMENT OCCUR IN A VACUUM. JACQUELINE'S DOMESTIC ARRANGEMENTS ARE KNOWN TO HER NEIGHBORS AND THEIR CHILDREN; TESTIMONY AT THE HEARING INDICATED THAT WAYNE HAMMON PLAYED WITH THE JARRETT CHILDREN AND THEIR FRIENDS AT THE JARRETT HOME AND ALSO ENGAGED IN OTHER ACTIVITIES WITH THEM. IF THE JARRETT CHILDREN REMAINED IN THAT SITUATION, THEY MIGHT WELL BE COMPELLED TO TRY TO EXPLAIN HAMMON'S PRESENCE TO THEIR FRIENDS AND, PERHAPS, TO ENDURE THEIR TAUNTS AND JIBES. IN A CASE SUCH AS THIS THE TRIAL JUDGE MUST ALSO WEIGH THESE IMPONDERABLES, AND HE IS NOT LIMITED TO EXAMINING THE CHILDREN FOR CURRENT PHYSICAL MANIFESTATIONS OF

EMOTIONAL OR MENTAL DIFFICULTIES.

FINALLY, WE DO NOT BELIEVE THAT THE UNITED STATES SUPREME COURT'S OPINION IN STANLEY V. ILLINOIS (1972), 405 U.S. 645, 92 S. CT. 1208, 31 L. ED. 2D 551, REQUIRES A DIFFERENT RESULT. IN STANLEY THE SUPREME COURT FOUND THAT ILLINOIS STATUTES CREATED A PRESUMPTION THAT AN UNWED FATHER IS UNFIT TO EXERCISE CUSTODY OVER HIS CHILDREN. THE COURT HELD THAT DEPRIVING AN UNWED FATHER OF HIS ILLEGITIMATE CHILDREN WITHOUT A PRIOR HEARING TO DETERMINE HIS ACTUAL RATHER THAN PRESUMPTIVE UNFITNESS, WHEN THE STATE ACCORDS THAT PROTECTION TO OTHER PARENTS, DEPRIVES HIM OF EQUAL PROTECTION OF THE LAW.

[2] THE CASE BEFORE US IS FUNDAMENTALLY DIFFERENT. THE TRIAL COURT DID NOT PRESUME THAT JACQUELINE WAS NOT AN ADEQUATE PARENT, AS THE JUVENILE COURT IN EFFECT DID IN STANLEY. RATHER THE TRIAL COURT RECOG-

NIZED THAT THE AFFECTION AND CARE OF A PARENT DO NOT ALONE ASSURE THE WELFARE OF THE CHILD IF OTHER CONDUCT OF THE PARENT THREATENS THE CHILD'S MORAL DEVELOPMENT. SINCE THE EVIDENCE INDICATED THAT JACQUELINE HAD NOT TERMINATED THE TROUBLESOME RELATIONSHIP AND WOULD PROBABLY CONTINUE IT IN THE FUTURE, THE TRIAL COURT TRANSFERRED CUSTODY TO WALTER JARRETT, AN EQUALLY CARING AND AFFECTIONATE PARENT WHOSE CONDUCT DID NOT CONTRAVENE THE STANDARDS ESTABLISHED BY THE GENERAL ASSEMBLY AND EARLIER JUDICIAL DECISIONS. ITS ACTION IN DOING SO WAS NOT CONCONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

ACCORDINGLY, WE REVERSE THE JUDGMENT OF THE APPELLATE COURT AND AFFIRM THE JUDGMENT OF THE CIRCUIT COURT OF COOK COUNTY.

APPELLATE COURT REVERSED; CIRCUIT COURT AFFIRMED.

GOLDENHERSH, CHIEF JUSTICE, WITH WHOM THOMAS J. MORAN, JUSTICE, JOINS, DISSENTING:

THE MAJORITY STATES, "THE CHIEF ISSUE IN THIS CASE IS WHETHER A CHANGE OF CUSTODY PREDICTED UPON THE OPEN AND CONTINUING COHABITATION OF THE CUSTODIAL PARENT WITH A MEMBER OF THE OPPOSITE SEX IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE IN THE ABSENCE OF ANY TANGIBLE EVIDENCE OF CONTEMPORANEOUS ADVERSE EFFECT UPON THE MINOR CHILDREN." (78 ILL.2D AT 345, 36 ILL. DEC. AT 3, 400 N.E. 2D AT 423.) AN EXAMINATION OF THE OPINION FAILS TO REVEAL ANY OTHER ISSUE, AND THE EFFECT OF THE DECISION IS THAT THE PLAINTIFF'S COHABITATION WITH HAMMON PER SE WAS SUFFICIENT GROUNDS FOR CHANGING THE CUSTODY ORDER PREVIOUSLY ENTERED. THIS RECORD SHOWS CLEARLY THAT THE CHILDREN WERE HEALTHY, WELL ADJUSTED, AND WELL CARED FOR, AND IT SHOULD BE NOTED

THAT BOTH THE CIRCUIT AND APPELLATE COURTS MADE NO FINDING THAT PLAINTIFF WAS AN UNFIT MOTHER. THE MAJORITY, TOO, MAKES NO SUCH FINDING AND BASED ITS DECISION ON A NEBULOUS CONCEPT OF INJURY TO THE CHILDREN'S "MORAL WELL-BEING AND DEVELOPMENT." (78 ILL 2D AT 347, 36 ILL. DEC. AT 4, 400 N.E. 2D AT 424.) I QUESTION THAT ANY COMPETENT SOCIOLOGIST WOULD ATTRIBUTE THE INCREASE OF "LIVE IN" UNMARRIED COUPLES TO PARENTAL EXAMPLE.

THE FRAGILITY OF ITS CONCLUSION CONCERNING "PREVAILING PUBLIC POLICY" IS DEMONSTRATED BY THE MAJORITY'S RELIANCE ON CASES DECIDED BY THIS COURT IN 1852 (SEARLS V. PEOPLE, 13 ILL. 597) AND 1902 (LYMAN V. PEOPLE, 198 ILL. 544, 64 N.E. 974), AND AN APPELLATE COURT DECISION (PEOPLE V. POTTER (1943), 319 ILL. APP. 409, 49 N.E. 2D 307) WHICH, RATHER THAN "PREVAILING PUBLIC POLICY," MORE CLEARLY INDICATES THE

PREJUDICE EXTANT IN THAT PERIOD AGAINST INTERRACIAL SEXUAL RELATIONS.

AS THE APPELLATE COURT POINTED OUT, THE COURTS SHOULD NOT IMPOSE THE PERSONAL PREFERENCES AND STANDARDS OF THE JUDICIARY IN THE DECISION OF THIS CASE. COURTS ARE UNIQUELY EQUIPPED TO DECIDE LEGAL ISSUES AND ARE WELL ADVISED TO LEAVE TO THE THEOLOGIANS THE QUESTION OF THE MORALITY OF THE LIVING ARRANGEMENT INTO WHICH THE PLAINTIFF HAD ENTERED.

AS A LEGAL MATTER, SIMPLY STATED, THE MAJORITY HAS HELD THAT ON THE BASIS OF HER PRESUMPTIVE GUILT OF FORNICATION, A CLASS B MISDEMEANOR, PLAINTIFF, ALTHOUGH NOT DECLARED TO BE AN UNFIT MOTHER, HAS FORFEITED THE RIGHT TO HAVE THE CUSTODY OF HER CHILDREN. THIS FINDING FLIES IN THE FACE OF THE ESTABLISHED RULE THAT IN ORDER TO MODIFY OR AMEND AN AWARD OF CUSTODY, THE EVIDENCE MUST SHOW THAT THE PARENT TO WHOM CUSTODY OF THE

CHILDREN WAS ORIGINALLY AWARDED IS UNFIT TO RETAIN CUSTODY, OR THAT A CHANGE OF CONDITIONS MAKES A CHANGE OF CUSTODY IN THEIR BEST INTERESTS. THIS RECORD FAILS TO SHOW EITHER. MR. JUSTICE MORAN AND I DISSENT AND WOULD AFFIRM THE DECISION OF THE APPELLATE COURT.

MORAN, JUSTICE, WITH WHOM GOLDENHERSH, CHIEF JUSTICE, JOINS, DISSENTING:

I JOIN IN THE DISSENT OF THE CHIEF JUSTICE, BUT ALSO DISSENT SEPARATELY. MY PRIMARY DISAGREEMENT WITH THE MAJORITY LIES WITH ITS COUNTENANCING A CHANGE OF CUSTODY BASED SOLELY ON A CONCLUSIVE PRESUMPTION THAT HARM TO THE JARRETT CHILDREN STEMMED FROM JACQUELINE'S LIVING ARRANGEMENTS. THE MAJORITY PURPORTS TO FOLLOW THE ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT. YET, UNDER THAT ACT, ONLY ON THE BASIS OF FACT CAN THERE BE A FINDING THAT A CHANGE IN CIRCUMSTANCES HAS OCCURRED AND THAT

MODIFICATION OF THE PRIOR CUSTODY JUDGMENT IS NECESSARY TO SERVE THE BEST INTEREST OF THE CHILDREN. (ILL. REV. STAT. 1977, CH. 40, PAR. 610(B).) THE COURT IS NOT TO CONSIDER CONDUCT OF A CUSTODIAN IF THAT CONDUCT DOES NOT AFFECT HIS RELATIONSHIP TO THE CHILD. (ILL. REV. STAT. 1977, CH. 40, PAR. 602(B).) IN THIS CASE, NOT ONE SCINTILLA OF ACTUAL OR STATISTICAL EVIDENCE OF HARM OR DANAGER TO THE CHILDREN HAS BEEN PRESENTED. TO THE CONTRARY, ALL OF THE EVIDENCE OF RECORD, AS RELATED BY THE MAJORITY, INDICATES THAT UNDER JACQUELINE'S CUSTODIANSHIP THE CHILDREN'S WELFARE AND NEEDS WERE MET. ALSO, THE TRIAL COURT EXPRESSLY DECLINED TO FIND JACQUELINE UNFIT. NEVERTHELESS, THE MAJORITY'S FINDING OF A VIOLATION OF THE SELDOM-ENFORCED FORNIFICATION STATUTE EFFECTIVELY FORECLOSED ANY FURTHER CONSIDERATION OF THE CUSTODY ISSUE. INSTEAD OF FOCUSING SOLELY ON THE BEST INTEREST

OF THE CHILDREN -- THE "GUIDING STAR" (NYE V. NYE (1952), 411 ILL. 408, 415, 105 N.E. 2D 300) -- THE MAJORITY HAS UTILIZED CHILD CUSTODY AS A VEHICLE TO PUNISH JACQUELINE FOR HER "MISCONDUCT." SUCH SELECTIVE ENFORCEMENT OF A STATUTE IS INAPPROPRIATE AND, ESPECIALLY IN THE CHILD-CUSTODY CONTEXT, UNFORTUNATE.

THE MAJORITY DECISION ALSO IS AT ODDS WITH THE PRINCIPLE OF STANLEY V. ILLINOIS (1972), 405 U.S. 645, 92 S. CT. 1208, 31 L. ED 2D 551. THE CONSTITUTIONAL INFIRMITY OF THE STATUTORY PRESUMPTION IN STANLEY CASTS DOUBT ON THE VALIDITY OF THE JUDICIALLY CREATED CONCLUSIVE PRESUMPTION IN THIS CASE. AFTER STANLEY, AN UNWED FATHER MAY NOT BE DEPRIVED OF HIS ILLEGITIMATE CHILDREN WITHOUT A PRIOR HEARING TO DETERMINE HIS ACTUAL FITNESS. SIMILARLY, JACQUELINE SHOULD NOT BE DEPRIVED OF THE CHILDREN IN THE ABSENCE OF EVIDENCE THAT A CHANGE IS NECESSARY TO

SERVE THE BEST INTEREST OF THE CHILDREN. A HEARING AT WHICH CUSTODY IS DETERMINED ON THE BASIS OF THE CONCLUSIVE PRESUMPTION SANCTIONED BY THE MAJORITY AMOUNTS TO NO HEARING AT ALL.

NO. 17189

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

IN RE: THE MARRIAGE OF	)	
	)	
JOHN DELANCE THOMPSON,	)	APPEAL FROM
	)	CIRCUIT COURT
PETITIONER-COUNTER-	)	COLES COUNTY
RESPONDENT-APPELLEE,	)	79-D-363
	)	
AND	)	HONORABLE
	)	JAMES R.
KATHRYN MAE THOMPSON,	)	WATSON, JUDGE
	)	PRESIDING.
RESPONDENT-COUNTER-	)	
PETITIONER-APPELLANT.	)	

RULE 23 ORDER

RESPONDENT, KATHRYN MAE THOMPSON,

APPEALS PORTIONS OF A MARRIAGE DISSOLUTION DECREE ENTERED BY THE CIRCUIT COURT OF COLES COUNTY ON MAY 6, 1981, DISSOLVING HER MARRIAGE TO PETITIONER, JOHN DELANCE THOMPSON. SHE APPEALS THE PORTIONS OF THE DECREE AWARDING CUSTODY OF DANNY, THE THEN THREE-YEAR-OLD SON OF THE PARTIES, TO PETITIONER AND THE PORTIONS DIVIDING THE MARITAL PROPERTY. SHE CONTENDS: (1) THE COURT SHOULD HAVE DEFERRED JURISDICTION TO A TRIAL COURT IN THE STATE OF MICHIGAN; (2) THE AWARD OF CUSTODY WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE; (3) THE DIVISION OF PROPERTY WAS ERRONEOUS; (4) THE COURT ERRED IN SUSTAINING OBJECTION TO HER OFFER OF PROOF OF PETITIONER'S REPUTATION; AND (5) THE COURT ERRED IN REFUSING TO ALLOW HER TO REOPEN HER CASE.

THE CLAIM THAT THE COURT SHOULD HAVE DEFERRED TO THE MICHIGAN COURT WAS BASED UPON CONDUCT OF PETITIONER IN TAKING DANNY

FROM RESPONDENT IN MICHIGAN AND RETURNING WITH HIM TO THE STATE OF ILLINOIS. THE FOLLOWING WAS ESTABLISHED BY UNDISPUTED EVIDENCE. PRIOR TO NOVEMBER 30, 1979, THE COUPLE CONTEMPLATED DISSOLVING THEIR MARRIAGE. ON THAT DATE RESPONDENT LEARNED THAT PETITIONER, OSTENSIBLY AWAY ON BUSINESS, WAS ACTUALLY VISITING AND HAVING SEXUAL INTERCOURSE WITH A FEMALE BUSINESS ASSOCIATE. RESPONDENT THEN TOOK DANNY WITH HER FROM THE MARITAL HOME AT LERNA, ILLINOIS, TO HER PARENTS HOME IN MICHIGAN. ON DECEMBER 7, 1979, PETITIONER FILED A PETITION FOR DISSOLUTION IN THE CIRCUIT COURT OF COLES COUNTY AND OBTAINED AN ORDER FOR TEMPORARY CUSTODY OF DANNY. SUBSEQUENTLY RESPONDENT FILED SUIT IN A TRIAL COURT IN MICHIGAN AND, ON DECEMBER 12, 1979, OBTAINED AN ORDER OF THAT COURT GRANTING HER TEMPORARY CUSTODY OF DANNY. PETITIONER OBTAINED INFORMATION AS TO RESPONDENT'S WHEREABOUTS

AND ON DECEMBER 30, 1979, FLEW THERE, ACCOMPANIED BY A PRIVATE DETECTIVE, FORCIBLY TOOK DANNY FROM PETITIONER AND RETURNED WITH HIM TO ILLINOIS.

THE UNIFORM CHILD CUSTODY JURISDICTION ACT (ILL. REV. STAT. 1979, CH. 40, PAR. 2101 ET SEQ.) PROVIDES GUIDELINES TO AVOID CONFLICT AND COMPETITION WITH COURTS OF OTHER STATES IN DETERMINING MATTERS OF CHILD CUSTODY. AMONG THE PURPOSES OF THE ACT ARE: (1) TO ASSURE THE LITIGATION CONCERNING THE CUSTODY OF THE CHILD TAKE PLACE IN THE STATE WITH WHICH THE CHILD AND THE FAMILY HAS THE CLOSEST CONNECTION; AND (2) TO DETER ABDUCTIONS AND OTHER UNILATERAL REMOVALS OF CHILDREN UNDERTAKEN TO OBTAIN CUSTODY AWARDS. ILL. REV. STAT. 1979, CH. 40, PAR. 2102(3), (5).

SECTION 4(A)(1) OF THE ACT (ILL. REV. STAT. 1979, CH. 40, PAR. 2104 (A)(1) PROVIDES THAT THE CIRCUIT COURTS HAVE "JURISDICTION"

TO MAKE A CHILD CUSTODY DETERMINATION IF THE STATE IS THE HOME STATE OF THE CHILD AT THE TIME OF THE COMMENCEMENT OF THE PROCEEDING OR HAD BEEN THE CHILD'S HOME STATE WITHIN SIX MONTHS BEFORE COMMENCEMENT OF THE PROCEEDING. HOWEVER, SECTION 9 (ILL. REV. STAT. 1979, CH. 40, PAR. 2109) PROVIDES THAT IF THE PETITIONER FOR AN INITIAL JUDGMENT HAS WRONGFULLY TAKEN THE CHILD FROM ANOTHER STATE OR HAS ENGAGED IN SIMILAR REPREHENSIBLE CONDUCT, THE COURT MAY DECLINE TO EXERCISE "JURISDICTION" IF TO DO SO IS JUST AND PROPER UNDER THE CIRCUMSTANCES.

WE DISAPPROVE THE CONDUCT OF PETITIONER IN FORCIBLY OBTAINING PHYSICAL CUSTODY OF DANNY FROM RESPONDENT IN MICHIGAN AND RETURNING HIM TO ILLINOIS. PETITIONER MAINTAINS HE USED DILIGENCE TO DETERMINE WHETHER ANY MICHIGAN COURT HAD RULED ON THE CHILD'S CUSTODY. REGARDLESS, WE DEEM PETITIONER'S ACTIONS TO BE THE TYPE OF

CONDUCT SECTION 9(A) WAS DESIGNED TO PREVENT. THE REMEDY PROVIDED BY SECTION 9(A) IS FOR THE AGGRIEVED SPOUSE TO REQUEST THE FORUM STATE TO DECLINE TO EXERCISE JURISDICTION SO THAT THE WRONGFUL OBTAINING OF CUSTODY WILL NOT DETERMINE THE FORUM FOR THE DECISION. HAD RESPONDENT MADE SUCH A REQUEST HERE, BEFORE THE COURT HAD HEARD THE CASE ON THE MERITS, SHE MAY HAVE HAD A VALID CLAIM. HOWEVER, NO SUCH REQUEST WAS MADE IN THE TRIAL COURT. IN THE CLOSING ARGUMENTS ON JANUARY 21, 1981, MORE THAN A YEAR AFTER THE CASE HAD COMMENCED, RESPONDENT'S COUNSEL CALLED THE COURT'S ATTENTION TO SECTION 9. HE DID NOT REQUEST THAT THE COURT DEFER JURISDICTION TO MICHIGAN BUT MERELY REQUESTED THAT THE COURT CONSIDER THE VIOLATION IN MAKING ITS DETERMINATION AS TO CUSTODY. WE DO NOT DEEM THAT TO BE THE REMEDY ENVISIONED BY THE ACT.

THE WORD "JURISDICTION" IS OBVIOUSLY NOT USED IN SECTION 9(A) IN THE STRICT SENSE OF THE POWER OF THE COURT TO HEAR THE CASE, A POWER WHICH IF LACKING WOULD RENDER THE COURT'S JUDGMENT VOID. RATHER THE WORD "JURISDICTION" IS USED IN A BROADER SENSE REFERRING TO A POWER WHICH THE COURT CAN EXERCISE OR NOT AS IT DETERMINES TO BE PROPER. THUS ANY ISSUE OF THE COLES COUNTY CIRCUIT COURT'S EXERCISE OF ITS "JURISDICTION" HERE HAS BEEN WAIVED BY FAILURE OF RESPONDENT TO TIMELY RAISE THE ISSUE.

MUCH OF THE RESPONDENT'S CLAIM THAT THE CUSTODY AWARD WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE ARISES FROM EVIDENCE OF IMMORAL CONDUCT ON THE PART OF PETITIONER. UNDISPUTED EVIDENCE WAS PRESENTED OF HIS HAVING SEXUAL INTERCOURSE WITH SEVERAL WOMEN, ONE OF WHOM TOOK CARE OF DANNY AND STAYED IN THE HOME WITH PETITIONER AND DANNY OVER SEVERAL WEEKENDS.

THIS CONDUCT, ALTHOUGH NOT TO BE CONDONED, WAS NOT COMPARABLE TO THAT HELD TO BE SUFFICIENT OF ITSELF TO JUSTIFY THE TRIAL COURT IN CHANGING THE CUSTODY OF CHILDREN 7, 10, AND 12 YEARS OF AGE IN JARRETT V. JARRETT (1979), 78 ILL. 2D 337, 400 N.E. 2D 421. THERE, THE CUSTODIAL SPOUSE AND THE PARAMOUR COHABITATED OPENLY AND CONTINUOUSLY AND THE CHILDREN WERE AWARE OF THE IMPROPRIETY OF THEIR RELATIONSHIP.

A SUBSTANTIAL NUMBER OF WITNESSES TESTIFIED ON BEHALF OF PETITIONER INDICATING DANNY WAS SICKLY, UNDISCIPLINED AND OVER-WEIGHT PRIOR TO COMING INTO PETITIONER'S CUSTODY, AND THAT THEREAFTER DANNY IMPROVED, AND A WARM, LOVING RELATIONSHIP DEVELOPED BETWEEN THE FATHER AND THE SON. THE CASE WAS NOT HEARD ON THE MERITS UNTIL DECEMBER OF 1980, A YEAR AFTER PETITIONER HAD OBTAINED CUSTODY OF THE CHILD. PETITIONER EMPHASIZES THAT

RESPONDENT HAD LITTLE CONTACT WITH DANNY DURING THIS PERIOD AND MAINTAINS THIS INDICATED A LACK OF INTEREST ON HER PART. HOWEVER, SHE TESTIFIED THAT HER FINANCIAL CIRCUMSTANCES AND FEAR OF PETITIONER PREVENTED HER FROM VISITING DANNY. IN ADDITION SHE STATED THAT SHE DID NOT KNOW WHERE PETITIONER AND DANNY WERE FROM JULY TO DECEMBER 1980.

THE WOMAN WHO HAD STAYED WITH PETITIONER AND DANNY ON WEEKENDS TESTIFIED PETITIONER HAD THREATENED TO REVEAL PICTURES OF HER IN THE NUDE IF SHE TESTIFIED AGAINST HIM. SHE STATED SHE FEARED PETITIONER. RESPONDENT ALSO TESTIFIED TO FEARING PETITIONER. EVIDENCE WAS ALSO PRESENTED THAT PETITIONER WAS FIRED FROM A JOB FOR TAKING SOME SALVAGE ITEMS WITHOUT PAYING FOR THEM. THE EVIDENCE CAST QUESTION UPON PETITIONER'S CHARACTER.

EVIDENCE ALSO SHOWED PETITIONER HAD MOVED TWICE DURING THE YEAR BETWEEN FILING SUIT AND THE HEARING OF THE EVIDENCE. THIS WAS A MATERIAL MATTER OR CONCERN. (RUSSELL v. RUSSELL (1979), 80 ILL. APP. 3D 41, 399 N.E. 2D 212; HOLLOWAY v. HOLLOWAY (1973), 10 ILL. APP. 3D 662, 294 N.E. 2D 759.) HOWEVER, AS DANNY WAS NOT SHOWN TO HAVE BEEN ADVERSELY AFFECTED BY THE MOVES OR PETITIONER'S CHANGE OF JOBS, THE EVIDENCE DID NOT REQUIRE THE CUSTODY BE AWARDED TO THE MOTHER. (MASON v. MASON (1977), 49 ILL. APP. 3D 775, 364, N. E. 2D 705.) THE FACT THAT DANNY WAS OF TENDER YEARS AND THE RESPONDENT WAS THE MOTHER WAS ALSO NOT CONTROLLING. (IN RE MARRIAGE OF RAMER (1980), 84 ILL. APP. 3D 213, 405 N.E. 2D 401.) AS WE HAVE INDICATED, WE DO NOT APPROVE OF PETITIONER'S CONDUCT IN TAKING CUSTODY OF DANNY BY FORCE IN MICHIGAN, BUT WE DO NOT CONSIDER THAT TO BE A SERIOUS ELEMENT TO

CONSIDER IN DETERMINING CUSTODY. THE REMEDY AVAILABLE TO RESPONDENT WOULD HAVE BEEN FOR HER TO MAKE TIMELY REQUEST FOR THE COURT TO HAVE DEFERRED TO THE JURISDICTION OF THE MICHIGAN COURT.

BECAUSE OF THE EVIDENCE OF THE HEALTHY RELATIONSHIP BETWEEN PETITIONER AND DANNY AND THE EVIDENCE THAT DANNY WAS DOING WELL IN HIS FATHER'S CUSTODY, WE DO NOT FIND THE AWARE OF PERMANENT CUSTODY TO PETITIONER TO HAVE BEEN CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE OR A BREACH OF DISCRETION.

WE CAN DISPOSE OF THE QUESTION OF THE DIVISION OF PROPERTY SUMMARILY. THE DIVISION NEED NOT BE EQUAL. (IN RE MARRIAGE OF MCMAHON (1980), 82 ILL. APP. 3D 1126, 403 N.E. 2D 730.) IT NEED ONLY BE JUST. (IN RE MARRIAGE OF ASCHWANDEN (1980), 82 ILL. 2D 31, 411 N.E. 2D 238.) HERE THE DIVISION FINALLY DETERMINED BY THE DECREE PLACED ON FILE WAS NEARLY EQUAL. HOWEVER, THE DECREE

DID NOT REQUIRE PETITIONER TO PAY RESPONDENT ONE-HALF OF THE AMOUNT OF A TAX REFUND CHECK IN THE SUM OF $742 WHICH HE HAD CASHED BY SIGNING HER NAME TO THE CHECK WITHOUT HER AUTHORITY. PETITIONER DOES NOT DISPUTE THAT RESPONDENT WAS ENTITLED TO HAVE RECEIVED $371 OF THE PROCEEDS OF THAT CHECK. WE FIND NO ERROR IN THE DIVISION OF PROPERTY OTHER THAN THIS APPARENTLY INADVERTENT OMISSION.

RESPONDENT ATTEMPTED TO OFFER INTO EVIDENCE A LETTER PURPORTEDLY WRITTEN BY PETITIONER'S FORMER WIFE TO HIM. IT CONTAINED HER MANY COMPLAINTS ABOUT HIM. RESPONDENT OFFERED IT TO SHOW PETITIONER'S REPUTATION. REGARDLESS OF WHETHER REPUTATION EVIDENCE WAS PROPER AND REGARDLESS OF WHETHER REPUTATION SHOULD BE SHOWN BY A PRIOR STATEMENT OF ONE NOT CALLED AS A WITNESS, THE CONTENT OF THE DOCUMENT DID NOT

CONTAIN STATEMENTS WHICH, IF PROPERLY PRESENTED, COULD BE USED TO PROVE REPUTATION (I.E., THE COMPOSITE OPINION OF WHAT A GROUP OF PEOPLE THINK OF A PERSON.) (CLEARY AND GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE § 405.1, 405.2 (3RD ED. 1979).) THE LETTER CONTAINED ONLY THE WRITER'S OPINION OF PETITIONER AND CITED INSTANCES OF HIS ALLEGED WRONGFUL CONDUCT. THE COURT PROPERLY SUSTAINED OBJECTION TO ITS OFFER.

ALTHOUGH EVIDENCE AS TO THE MERITS OF THE CASE WAS HEARD IN DECEMBER 1980, THE DECREE FROM WHICH APPEAL WAS TAKEN WAS NOT ENTERED UNTIL MAY 6, 1981. ON APRIL 1, 1980, RESPONDENT MOVED TO REOPEN THE CASE TO OFFER ADDITIONAL EVIDENCE TO SHOW: (1) RESPONDENT HAD PURPORTEDLY REMARRIED ON DECEMBER 24, 1980, SEVERAL MONTHS BEFORE THE DIVORCE DECREE WAS ENTERED; (2) HE HAD BEEN FIRED FROM THE EMPLOYMENT HE HELD AT THE TIME OF HEARING; AND (3) HE HAD

FILED IN BANKRUPTCY IN MARCH 1981. WHETHER THE COURT SHOULD ALLOW A PARTY TO REOPEN TO PRODUCE FURTHER EVIDENCE IS A MATTER IN WHICH THE COURT HAS SUBSTANTIAL DISCRETION. (FLOWERS V. KELLAR (1926), 322 ILL. 265, 153 N.E. 351.) THE MOTION HERE WAS NOT SUPPORTED BY AFFIDAVIT, AND NEITHER THE LOSS OF PETITIONER'S JOB NOR HIS BANKRUPTCY WOULD HAVE BEEN OF SUBSTANTIAL SIGNIFICANCE AS LONG AS DANNY WAS BEING WELL CARED FOR. THE ATTEMPTED MARRIAGE WAS MORE SERIOUS, BUT IT OCCURRED AFTER THE COURT HAD PRONOUNCED IN OPEN COURT THAT THE GROUNDS FOR DISSOLUTION HAD BEEN PROVED. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO REOPEN THE CASE.

ACCORDINGLY, WE AFFIRM ALL ASPECTS OF THE DECREE ON APPEAL EXCEPT THAT WITH REFERENCE TO THE DIVISION OF PROPERTY. WE REVERSE THAT PORTION OF THE DECREE TO THE EXTENT THAT IT MAKES NO REFERENCE TO

PETITIONER BEING REQUIRED TO REIMBURSE RESPONDENT IN THE SUM OF $371 AS HER SHARE OF THE TAX REFUND CHECK HE HAD CASHED. THE CASE IS REMANDED TO THE CIRCUIT COURT OF COLES COUNTY WITH DIRECTIONS THAT THE DECREE BE AMENDED ACCORDINGLY.

AFFIRMED IN PART; REVERSED IN PART; REMANDED WITH DIRECTIONS.

ENTERED: NOVEMBER 5, 1981

ORDER DRAFTED BY GREEN, J., AND CONCURRED IN BY LONDRIGAN, J.; WEBBER, J., CONCURS IN PART, DISSENTS IN PART.

MR. JUSTICE WEBBER, CONCURRING IN PART AND DISSENTING IN PART:

I CONCUR WITH THE MAJORITY THAT JURISDICTION OF THE CAUSE LAY IN ILLINOIS AND IN THE ERROR IN THE DIVISION OF MARITAL PROPERTY. HOWEVER, I AM FIRMLY CONVINCED THAT

THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING CUSTODY TO THE HUSBAND AND IN REFUSING TO TAKE ADDITIONAL EVIDENCE.

THE ENTIRE RECORD REVEALS THE FATHER AS A PATENT BULLY WHO WILL USE ANY MEANS TO OBTAIN HIS OWN WAY. THE SNATCHING OF THE CHILD FROM THE STREET IN MICHIGAN, THE THREAT TO THE POTENTIAL WITNESS WHICH RESULTED IN CRIMINAL CHARGES OF DISORDERLY CONDUCT, THE FEAR ENGENDERED IN THE MOTHER - NONE OF THESE ARE CHARACTERISTIC OF ONE OF NATURE'S NOBLEMEN. ADD TO THE MIXTURE HIS ERRATIC WORK RECORD, HIS ADMITTED FORGERY IN THE ENDORSEMENT OF THE CHECK AND HIS ILLICIT AFFAIRS, AND I CANNOT COMPREHEND HOW HE CAN BE ADJUDGED FIT.

THE EVIDENCE PRESENTED AS TO THE IMPROVEMENT IN THE CHILD'S HEALTH AND ATTITUDE SINCE THE SEPARATION PROVES ONLY THAT THE DISSENSION WITHIN THE MARRIAGE WAS THE PROBABLE CAUSE OF HIS PRIOR ILL-

BEING. GIVEN THE NATURE OF THE FATHER, IT IS NOT TOO DIFFICULT TO DEDUCE WHERE THE TROUBLE LAY, NOR WHY THE MOTHER FAILED TO COMMUNICATE WITH THE CHILD, A FACT UPON WHICH THE TRIAL COURT AND THE FATHER LAY GREAT EMPHASIS. IF THIS FATHER IS TO BE THE ROLE-MAKER FOR THE BOY, IT WILL BE WISE FOR THE JUVENILE COURT TO BE PREPARED TO SEE THEM BOTH WITHIN A RELATIVELY SHORT TIME.

THE TRIAL COURT FURTHER ERRED IN REFUSING TO RECEIVE THE FURTHER EVIDENCE OF THE FATHER'S BIGAMOUS MARRIAGE, HIS JOB LOSS AND BANKRUPTCY. THE FORMER BEARS DIRECTLY UPON HIS ATTITUDE TOWARDS LAWS AND CIVILIZED CONDUCT AND THE LATTER UPON HIS ABILITY TO SUPPORT THE CHILD.

I WOULD AFFIRM THE QUESTION OF JURISDICTION, BUT IN ADDITION TO REVERSING FOR MODIFICATION OF THE PROPERTY DISPOSITION, I WOULD ALSO REVERSE THE CUSTODY AWARD WITH

DIRECTIONS TO TAKE THE ADDITIONAL EVIDENCE AND RECONSIDER.

PETITION FOR REHEARING

MAY IT PLEASE THE COURT: KATHRYN MAE THOMPSON, PETITIONER, SUBMITS THAT THIS COURT HAS OVERLOOKED THE FOLLOWING POINTS AND AUTHORITIES IN REACHING ITS DECISION IN THIS CASE:

THEY ARE AS FOLLOWS:

A. AFFECTION AND CARE OF A PARENT DO NOT ALONE ASSUME THE WELFARE OF THE CHILD, IF OTHER CONDUCT OF THE PARENT THREATENS THE CHILD'S MORAL DEVELOPMENT.

B. THE REQUIREMENT OF SEC. 602(B), CH. 40, ILL. REV. STATS., "THE COURT SHALL NOT CONSIDER THE CONDUCT OF THE PRESENT OR PROPOSED GUARDIAN THAT DOES NOT EFFECT HIS RELATIONSHIP TO THE CHILD," INCLUDES NOT ONLY CURRENT AND PRESENT DANGERS

WHICH ARE VISIBLE AND OBVIOUS, BUT ALSO INCLUDES FUTURE POTENTIAL DANGERS WHICH MAY TAKE YEARS TO SHOW THEIR ADVERSE EFFECT ON THE CHILD. THIS INCLUDES NOT ONLY MORAL HAZARDS, BUT ALSO MENTAL AND EMOTIONAL HEALTH OF THE CHILD."

BOTH OF THESE POINTS ARE FOUND IN THE CASE OF JARRETT VS. JARRETT, 36 ILL. DEC. 1, P. 6, 400 N.E. 2D, 421, 78 ILL. 2D, 337, 1979.

WE POINT OUT THAT THIS COURT HAS FAILED TO TAKE INTO ACCOUNT THE LONG TERM EFFECT OF JOHN THOMPSON'S MANY FAILINGS ON THE CHILD DANNY, AS REQUIRED BY THE JARRETT VS. JARRETT CASE.

ONE MUST CONCLUDE FROM READING THIS COURT'S OPINION THAT JOHN THOMPSON'S FAILINGS HAVE NOT AND WILL NOT ADVERSELY EFFECT THE CHILD, DANNY. QUERY: HOW CAN THIS COURT MAKE THAT CONCLUSION WITH A CHILD WHO WAS 2½ TO 3½ YEARS OLD WHEN ALL

OF THESE ACTIONS, ON HIS FATHER'S PART, WERE TAKING PLACE? THESE ACTIONS, MOST OF WHICH WERE CONDEMNED BY THIS COURT, DID NOT AND WILL NOT ADVERSELY EFFECT THE CHILD ACCORDING TO THIS COURT'S OPINION. WE SUBMIT THAT THOSE ACTIONS WILL BE ADVERSELY REFLECTED IN THE CHILD MANY YEARS HENCE.

THIS COURT'S OPINION ESTABLISHES THAT THERE ARE NO MORAL CONSIDERATIONS IN AWARDING CUSTODY OF THE CHILD WHICH WE SUBMIT IS CONTRARY TO THIS COURT'S HOLDING IN THE JARRETT CASE.

WE POINT OUT THAT THE COURT FAILED TO TAKE INTO ACCOUNT THE FACT THAT JOHN THOMPSON FAILED TO SHOW LITTLE OR NO INTEREST IN OR SUPPORT HIS TWO CHILDREN BY A PREVIOUS MARRIAGE.

THE ONLY SUPREME COURT DECISION WHICH REALLY TOUCHES ON THE FACTS OF THIS CASE AND THE LAW APPLICABLE TO THE FACTS

OF THIS CASE IS JARRETT VS. JARRETT, 78 ILL. 2D 337, 400 N.E. 2D, 421 36 ILL. DEC. 1. IN JARRETT, THE ILLINOIS DECISION CASE, P. 4, THIS COURT STATES THAT THE GENERAL ASSEMBLY, IN ENACTING THE NEW ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT REFUSED TO SANCTION ANY NON-MARITAL RELATIONSHIP AND DECLARED THE PURPOSE OF STRENGTHENING AND PRESERVING THE INTEGRITY OF THE MARRIAGE AND THE SAFEGUARDING OF FAMILY RELATIONSHIP.

THIS COURT IN THIS CASE ALSO ON P.4, POINTS OUT THAT THE FORNICATION STATUTE CITED BY THE COURT IN THIS CASE AND THE ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT EVIDENCE THE RELEVANT MORAL STANDARDS OF THE STATE AS DECLARED BY THE LEGISLATURE.

WE SUBMIT THAT THE RELEVANT MORAL STANDARDS OF THIS STATE ARE VERY MUCH A PART OF THE LAW OF THIS STATE AND WE SUB-

MIT HAVE BEEN OVERLOOKED BY THIS COURT IN REACHING ITS OPINION.

THIS COURT, IN JARRETT, RECOGNIZED THAT WITH CHILDREN IN THE PRESENCE OF PARENTS WHO ARE DISREGARDING THE STANDARDS OF SOCIETY, THOSE CHILDREN ARE BEING INSTRUCTED BY EXAMPLE. THE IGNORING OF THOSE STANDARDS BY THE PARENT ARE AN INVITATION TO THE CHILD TO IGNORE THEM WHEN THEY REACH A CERTAIN AGE AND AMOUNT TO AN ENCOURAGEMENT TO THE CHILDREN TO ENGAGE IN SIMILAR ACTIVITY IN THE FUTURE. THIS COURT REFERRED TO THE CASE OF NYE VS. NYE (1952), 411 ILL. 408, 415, 105 N.E. 2D 300, HOLDING THAT THE TRIAL COURT'S ATTENTION MUST BE FOCUSED ON THE MORAL VALUES WHICH THE PARENT IS ACTUALLY DEMONSTRATING TO THE CHILD.

AT PAGE 5 OF THE JARRETT OPINION, IN ANSWER TO THE ARGUMENT BY THE MOTHER THAT THERE HAD BEEN NO SHOWING THAT THE MOTHER'S MORAL INDISCRETION SHOWED ANY

DETRIMENTAL EFFECT ON THE CHILD OR CHILDREN, THE COURT SAID, "IN CASES SUCH AS THIS ONE, HOWEVER, SUCH A NARROW INTERPRETATION OF THE STATUTE WOULD DEFEAT ITS PURPOSE." AT THE TIME OF THE HEARING THE THREE JARRETT CHILDREN WHO WERE THEN 12, 10, AND 7 YEARS OLD WERE OBVIOUSLY INCAPABLE OF EMULATING THEIR MOTHER'S MORAL INDISCRETIONS. TO WAIT UNTIL LATER YEARS TO DETERMINE WHETHER JACQUELINE HAD INCULCATED HER MORAL VALUES IN THE CHILDREN WOULD BE TO WAIT A DEMONSTRATION THAT THE VERY HARM WHICH THIS STATUTE SEEKS TO AVOID HAD OCCURRED. MEASURES TO SAFEGUARD THE MORAL WELL BEING OF CHILDREN WHOSE LIVES HAVE ALREADY BEEN DISRUPTED BY THE DIVORCE OF THEIR PARENTS, CANNOT HAVE BEEN INTENDED TO BE DELAYED UNTIL THERE ARE TANGIBLE MANIFESTATIONS OF DAMAGE TO THEIR CHARACTER. THE COURT ON PAGE 6 STATED, AFFIRMING THE TRIAL COURT, "RATHER THE TRIAL COURT RECOGNIZED THAT

THE AFFECTION AND CARE OF A PARENT DO NOT ALONE ASSURE THE WELFARE OF THE CHILD IF OTHER CONDUCT OF THE PARENTS THREATENS THE CHILD'S MORAL DEVELOPMENT."

JOHN THOMPSON HAS INDEED BEEN GUILTY OF MANY TRANSGRESSIONS OF SOCIETY'S STANDARDS AS HAS BEEN SHOWN IN THIS CASE AND RECOGNIZED BY THIS COURT IN ITS OPINION. THIS IS A CASE OF WHO GETS THE CHILD FROM THE FIRST INSTANCE RATHER THAN THE QUESTION OF TAKING THE CHILDREN AWAY FROM ONE OF THE PARENTS WHO HAD PREVIOUSLY BEEN AWARDED CUSTODY AS WAS THE CASE IN THE JARRETT CASE. WE BELIEVE THE RULE SHOULD BE MORE RESPONSIVE TO THE MORAL CONSIDERATIONS AT THAT POINT OF TIME THAN IT WOULD BE LATER WHEN THE QUESTION OF REMOVING THE CHILD FROM THE CUSTODIAL PARENT IS INVOLVED. WE SUBMIT THAT THIS COURT, BY ITS OPINION, TACITLY FINDS THAT THESE TRANSGRESSIONS BY JOHN THOMPSON WILL NOT EFFECT THE CHILD.

IT IS SUBMITTED THAT THIS COURT HAS REMOVED ANY MORAL CONSIDERATIONS IN REVIEWING THIS CASE AND HAS IN FACT GONE AGAINST THE MANDATE OF THE JARRETT CASE.

II

THIS COURT, HOWEVER, DID NOT OVERRULE THE JARRETT CASE IN ITS OPINION BUT MERELY FAILED TO APPLY IT. THE AFFECT OF THIS RULING IN THIS CASE (LEAVING THE JARRETT OPINION STANDING UNREVERSED) IS TO LET TRIAL JUDGES AWARD CUSTODY WITHOUT ANY GUIDELINES, YARDSTICKS, REASON, OR LAW WHATSOEVER. WE SUBMIT WITH THESE TWO CASES, THIS CASE AND THE JARRETT CASE, COMPLETELY CONTRADICTORY OF EACH OTHER, THE TRIAL COURT IS PRETTY MUCH LEFT TO DO WHATEVER IT DESIRES TO DO WITH A CUSTODY CASE. INDEED, WE SUBMIT THESE TWO CASES CONTRADICTING EACH OTHER, RESULT IN THE TRIAL JUDGE HAVING NO LAW WHICH HE IS OBLIGED TO FOLLOW IN THESE CASES AND THAT THEREFORE HIS DECISION COULD COME AS THE

RESULT OF HIS WHIM, CAPRICE, BIAS, PREJUDICE, OR ARBITRARINESS.

WE SUBMIT THAT THE NET EFFECT OF THIS DECISION WILL BE TO CAUSE MANY MORE CASES TO BE LITIGATED ON THE QUESTION OF CUSTODY SINCE THERE IS INDEED NO YARDSTSICK OR NO LAW FOR THE LOWER COURTS TO FOLLOW IN DETERMINING WHICH PARENT SHOULD GET CUSTODY.

THE PHRASE, "THE BEST INTEREST OF THE CHILD", IS AN EMPTY PHRASE WITHOUT LOOKING AT THE QUALIFICATIONS OR LACK OF QUALIFICATIONS OF THE PARENTS AND REALLY IS MEANINGLESS IN TERMS OF THIS OPINION INSOFAR AS WHAT THE PARENTS HAVE DONE OR FAILED TO DO AS AFFECTING THE FINAL DISPOSITION OF THE CASE.

WE SUBMIT THAT ANOTHER ADVERSE EFFECT OF THIS OPINION WILL BE TO FORCE PARENTS OF CHILDREN TO STAY MARRIED IN UNDESIRABLE MARRIAGES RATHER THAN RISK THE LOSS OF CUSTODY OF THEIR CHILDREN. THE PUBLIC, THAT IS THE PARENTS, WHO MIGHT BE LITIGATING CUSTODY

QUESTIONS IN THE FUTURE, BECAUSE OF THIS CASE, WILL NOT KNOW HOW TO CONDUCT THEMSELVES IN ORDER TO PROTECT THEIR CUSTODIAL RIGHTS WITH THEIR CHILDREN SINCE INDEED THIS CASE BY LEAVING THE JARRETT CASE UNREVERSED AMOUNTS AND IS TANTAMOUNT TO NO RULE OR LAW AT ALL FOR THE COURTS TO FOLLOW IN FUTURE CASES.

III

CONSTITUTIONAL ARGUMENT

WHEN THIS COURT TREATED THE UNIFORM CHILD CUSTODY JURISDICTION ACT, AND ESPECIALLY SEC. 2109 THEREOF OF CHAPTER 40 OF THE ILL. REV. STATS., AS A MATTER OF PROCEDURE RATHER THAN SUBSTANCE UNDER THE FACTS IN THIS CASE, IT EFFECTIVELY DENIED KATHRYN MAE THOMPSON HER RIGHTS UNDER THE UNITED STATES CONSTITUTION, SECTION 1, ARTICLE 4, WHICH PROVIDES, "FULL FAITH AND CREDIT SHALL BE GIVEN IN EACH STATE TO PUB-

LIC ACTS, RECORDS, AND JUDICIAL PROCEEDINGS OF EVERY OTHER STATE."

WE SUBMIT THAT WHEN THE ILLINOIS COURTS, INCLUDING THIS COURT, SAW THAT THE CHILD WAS FORCIBLY REMOVED FROM KATHY IN THE STATE OF MICHIGAN, WHEN SHE HAD A MICHIGAN COURT ORDER GIVING HER CUSTODY OF THE CHILD, THEN THE ILLINOIS COURTS SHOULD HAVE GIVEN FULL FAITH AND CREDIT TO THAT COURT ORDER OF THE STATE OF MICHIGAN, WHICH THEY DID NOT DO. WE SUBMIT THAT UPON THE ILLINOIS COURTS DETERMINING THAT THE CHILD WAS FORCIBLY ABDUCTED FROM THE MOTHER IN THE STATE OF MICHIGAN UNDER THE FACTS OF THIS CASE, THEN THEY SHOULD HAVE GIVEN FULL FAITH AND CREDIT TO THE MICHIGAN CUSTODY ORDER AND ORDERED THE CHILD RETURNED TO MICHIGAN. FAILURE TO DO SO VIOLATED KATHRYN MAE THOMPSON'S RIGHTS UNDER THE FULL FAITH AND CREDIT CLAUSE OF OF THE UNITED STATES CONSTITUTION SET OUT ABOVE.

We submit further that the refusal of the Illinois Courts to give full faith and credit to the Michigan Custody Order after they learned how JOHN THOMPSON got custody in Michigan of the child makes the Illinois Courts appear to give approval of these actions. This, in addition to denying KATHRYN THOMPSON her rights under the Full Faith and Credit Clause of the United States Constitution.

KATHRYN MAE THOMPSON was denied her rights to due process of law under the Federal Constitution being the Fourteenth Amendment of the United States Constitution which provides, "Nor shall any state deprive any person of life, liberty, or property without due process of law," and Article 1 of Section 2 of the Illinois Constitution which provides, "No person shall be deprived of life, liberty, or property without due process of law." We state that her rights

UNDER BOTH OF THESE DUE PROCESS CLAUSES, THAT IS THE FEDERAL AND STATE DUE PROCESS CLAUSES, WERE DENIED BY:

A. UNDER THE TOTAL FACTS OF THIS CASE THE AWARDING OF CUSTODY OF DANNY TO JOHN THOMPSON, AND DENYING CUSTODY TO HIS MOTHER, DENIES HER, HER RIGHTS UNDER THE DUE PROCESS CLAUSES OF THE FEDERAL AND STATE CONSTITUTION SET OUT ABOVE.

B. THE COURT IN FAILING TO OVERRULE THE LAW OF THE JARRETT CASE, BUT REFUSING TO APPLY THE RULE IN IT TO THIS CASE AT BAR, HAS CREATED A SITUATION WHERE THERE IS INDEED NO LAW TO GOVERN THE DISPOSITION OF CUSTODY CASES IN THE STATE OF ILLINOIS. THERE ARE NO YARDSTICKS TO FOLLOW. IT LEAVES THE JUDGE FREE TO ALLOW HIS WHIM, CAPRICE, BIAS OR ARBITRARINESS. THE FACT THAT THERE IS NO LAW IN THE STATE OF ILLINOIS TO GOVERN THIS TYPE OF SITUATION DENIED KATHRYN MAE THOMPSON DUE PROCESS OF LAW IN THE LOSS OF

THE CUSTODY OF HER SON, DANNY.

THE NET RESULT OF THIS CASE, LEAVING THE RULE ANNOUNCED IN THE JARRETT CASE UNREVERSED, IS TO RESULT IN NO LAW AT ALL FOR THE PEOPLE OF THE STATE OF ILLINOIS, ITS JUDGES AND ATTORNEYS TO FOLLOW IN A CUSTODY CASE, BUT PERMITS THE TRIAL COURT TO ACT ACCORDING TO HIS OR HER PERSONAL BIAS, PREJUDICE, WHIM OR CAPRICE. KATHRYN MAE THOMPSON HAS BEEN DENIED HER RIGHTS TO DUE PROCESS OF LAW UNDER THE ILLINOIS AND FEDERAL CONSTITUTIONS.

CONCLUSION

WE SUBMIT THAT ALTHOUGH THIS COURT CONDEMNED JOHN THOMPSON'S USE OF FORCE AND SELF-HELP TO TAKE THE MINOR CHILD OF THE PARTIES WITHOUT DUE PROCESS OF LAW FROM THE CHILD'S MOTHER IN THE STATE OF MICHIGAN, THIS COURT NEVERTHELESS REWARDED JOHN THOMPSON BY APPROVING THE AWARD OF THE CHILD TO HIM. THIS, WE SUBMIT, WILL ENCOURAGE OTHERS TO

USE SELF-HELP, FORCE AND VIOLENCE TO RETAKE CHILDREN FROM THEIR SPOUSES IN OTHER JURISDICTIONS BECAUSE IN THE BOTTOM LINE IT REALLY DOESN'T MAKE ANY DIFFERENCE IF A PARTY USES FORCE TO RETAKE A CHILD FROM THE OTHER PARENT OUTSIDE OF ILLINOIS.

FOR THE VARIOUS REASONS EXPRESSED HEREIN, AND BECAUSE OF THE VIOLATION OF THE CONSTITUTIONAL RIGHTS OF KATHRYN MAE THOMPSON, WE ASK THIS COURT TO GRANT A REHEARING OF THIS CAUSE AND REVERSE ITS DECISION ON THE QUESTION OF CUSTODY OF DANNY THOMPSON.

RESPECTFULLY SUBMITTED.

THOMAS J. LOGUE
GLENN & LOGUE, ATTORNEYS
901 CHARLESTON AVENUE
MATTOON, ILLINOIS 61938

ATTORNEY FOR KATHRYN MAE THOMPSON, PETITIONER.

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT
OF ILLINOIS
COLES COUNTY, CHARLESTON, ILLINOIS

IN RE: THE MARRIAGE OF	)	
	)	
JOHN DELANCE THOMPSON	)	
	)	NO. 79-D-363
AND	)	
	)	
KATHRYN MAE THOMPSON	)	

JUDGMENT OF DISSOLUTION OF MARRIAGE

Now on this 17th day of December, 1980, this cause comes on for hearing on Petition for Dissolution of Marriage and Response thereto, Counter-Petition for Dissolution of Marriage and Response thereto, both parties present in Court in person and by counsel, evidence heard and the Court being otherwise fully advised in the premises, finds:

(1) That Petitioner and Counter-Respondent, JOHN DELANCE THOMPSON, is, on the day of the hearing and has been for

MORE THAN 90 DAYS PRIOR THERETO, DOMICILED IN THE STATE OF ILLINOIS AND THAT RESPONDENT AND COUNTER-PETITIONER, KATHRYN MAE THOMPSON, WAS 90 DAYS PRIOR TO THE FILING OF THE PETITION HEREIN DOMICILED IN THE STATE OF ILLINOIS.

(2) THAT PETITIONER AND COUNTER-RESPONDENT, JOHN DELANCE THOMPSON, IS 32 YEARS OF AGE, EMPLOYED, AND A RESIDENT OF HIGHLAND, ILLINOIS. RESPONDENT AND COUNTER-PETITIONER, KATHRYN MAE THOMPSON, IS 26 YEARS OF AGE, EMPLOYED, AND PRESENTLY RESIDES IN KAWKAWLIN, MICHIGAN.

(3) THE PARTIES WERE MARRIED ON NOVEMBER 16, 1973 AND THAT MARRIAGE WAS REGISTERED IN WATERFORD, OAKLAND COUNTY, MICHIGAN.

(4) WITHOUT PROVOCATION ON THE PART OF COUNTER-PETITIONER, GROUNDS OF EXTREME AND REPEATED MENTAL CRUELTY EXIST FOR THE

DISSOLUTION OF THE MARRIAGE.

(5) ONE CHILD WAS BORN AS A RESULT OF THIS MARRIAGE AND THAT CHILD'S NAME IS DANIEL CLARK THOMPSON AND HE WAS BORN ON APRIL 18, 1977. NO OTHER CHILDREN HAVE BEEN BORN OR ADOPTED TO THE PARTIES AS A RESULT OF THIS MARRIAGE AND RESPONDENT AND COUNTER-PETITIONER, KATHRYN MAE THOMPSON, IS NOT NOW PREGNANT. BOTH PARTIES ARE FIT AND PROPER PERSONS TO HAVE THE CARE, CUSTODY AND CONTROL OF THE MINOR CHILD OF THE PARTIES AND THE BEST INTEREST OF THE MINOR CHILD WOULD BE SERVED IF HIS CUSTODY IS PLACED WITH PETITIONER AND COUNTER-RESPONDENT, JOHN DELANCE THOMPSON.

(6) THE PARTIES HAVE ACQUIRED BOTH REAL AND PERSONAL MARITAL PROPERTY DURING THE MARRIAGE.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

(A) THE MARRIAGE HERETOFORE ENTERED

INTO BY AND BETWEEN THE PARTIES IS HEREBY DISSOLVED ON THE GROUNDS OF EXTREME AND REPEATED MENTAL CRUELTY.

(B) THE CARE, CUSTODY, CONTROL AND EDUCATION OF THE MINOR CHILD OF THE PARTIES IS HEREBY AWARDED TO PETITIONER AND COUNTER-RESPONDENT, JOHN DELANCE THOMPSON. RESPONDENT AND COUNTER-PETITIONER, KATHRYN MAE THOMPSON, IS HEREBY AWARDED LIBERAL RIGHTS OF VISITATION WHICH SHALL BE DEFINED TO INCLUDE SIX WEEKS OF VISITATION DURING THE SUMMER MONTHS. SAID VISITATION SHALL BE WITHIN THE STATE OF ILLINOIS UNLESS RESPONDENT AND COUNTER-PETITIONER, KATHRYN MAE THOMPSON, DEPOSITS A $1,000.00 CASH OR PROPERTY BOND CONDITIONED UPON HER RETURN OF THE CHILD TO THE CUSTODIAL PARENT AT THE END OF THE VISITATION PERIOD.

(C) ALL PERSONAL PROPERTY NOT OWNED BY EITHER OF THE PARTIES PRIOR TO THE MARRIAGE AND OTHER THAN THE PERSONAL EFFECTS AND

CLOTHING SHALL BE SOLD AND THE PROCEEDS DIVIDED EQUALLY. EACH PARTY SHALL RETAIN THOSE ITEMS OWNED PRIOR TO THE MARRIAGE AND HIS OR HER RESPECTIVE PERSONAL EFFECTS AND CLOTHING.

(D) THE REAL ESTATE OWNED JOINTLY BY THE PARTIES, LOCATED AT R.R.1, LERNA, ILLINOIS, AND HERETOFORE OCCUPIED BY THEM AS A MARITAL RESIDENCE SHALL BE SOLD. FROM THE PROCEEDS THE EXPENSES OF SALE SHALL BE PAID AND THE FIRST MORTGAGE SECURED BY SAID RESIDENCE SHALL BE PAID AND THE BALANCE OF THE PROCEEDS, IF ANY, SHALL BE DIVIDED EQUALLY BETWEEN THE PARTIES.

(E) MAINTENANCE IS DENIED TO EACH PARTY.

(F) CHILD SUPPORT IS HEREBY RESERVED FOR FUTURE DETERMINATION.

ENTER: JUDGE

APPROVED:

THOMAS J. LOGUE
ATTORNEY FOR RESPONDENT AND
COUNTER-PETITIONER

JANUARY 27, 1981

MR. LAURENCE GRABB
RYAN, GRABB, CINI & BENNETT
1601 LAFAYETTE
MATTOON, IL 61938

MR. THOMAS LOGUE
GLENN & LOGUE
901 CHARLESTON
MATTOON, IL 61938

RE: THOMPSON VS. THOMPSON

GENTLEMEN:

PROPERTY:

THE MARRIAGE INVOLVED WAS OF RELATIVELY SHORT DURATION. THERE IS NO INDICATION THAT THERE WAS ANY INTENTION TO MAKE A GIFT OF ONE-HALF OF THE NON-MARITAL HOUSE AS WAS CONTENDED IN KEY. THIS COURT WAS HOPING THAT THE ILLINOIS SUPREME COURT WOULD BE DECIDING WHETHER THE TRANSMUTATION THEORY WOULD BE ADOPTED IN ILLINOIS. THIS ISSUE WILL BE DECIDED LATER WHEN IT RULES ON IN RE MARRIAGE OF ATKINSON LATER THIS YEAR. IF THE PARTIES WISH, THE REAL PROPERTY QUESTION CAN BE DEFERRED UNTIL ATKINSON

IS DECIDED.

IF THE PARTIES CANNOT DECIDE ON THE DIVISION OF PERSONAL PROPERTY, ALL WILL BE SOLD, OTHER THAN PERSONAL EFFECTS AND NON-MARITAL PROPERTY, AND THE PROCEEDS DIVIDED EQUALLY.

CUSTODY:

THE COURT FEELS EITHER PERSON QUALIFIED TO RAISE THE CHILD IN QUESTION, ALTHOUGH THERE ARE RESERVATIONS AS TO BOTH. DUE TO THE INTEREST SHOWN BY THE FATHER AND THE LACK OF SAME BY THE MOTHER, THE CUSTODY WILL BE PLACED WITH THE FATHER. LIBERAL IN STATE VISITATION IS GRANTED, OR IF A $1,000 CASH OR PROPERTY BOND IS FILED AND APPROVED, LIBERAL OUT OF STATE VISITATION CAN BE ARRANGED.

IF THE PARTIES WISH TO HAVE THE COURT DECIDE THE PROPERTY (REAL) ISSUE NOW, PLEASE ADVISE.

WILL MR. GRABB PREPARE AN ORDER IN ACCORDANCE WITH THIS LETTER.

YOURS VERY TRULY,
JAMES R. WATSON

JRW:JDL

MAY 27, 1983

MR. THOMAS J. LOGUE
ATTORNEY AT LAW
901 CHARLESTON AVENUE
MATTOON, IL 61938

No. 55948 - JOHN DELANCE THOMPSON, APPELLEE, vs. KATHRYN MAE THOMPSON, APPELLANT. APPEAL, APPELLATE COURT, FOURTH DISTRICT.

THE SUPREME COURT TODAY DENIED THE PETITION FOR REHEARING IN THE ABOVE ENTITLED CAUSE. THE MANDATE OF THIS COURT WILL ISSUE TO THE APPROPRIATE APPELLATE COURT, CIRCUIT COURT OR OTHER AGENCY ON JUNE 3, 1983.

VERY TRULY YOURS,
JULEANN HORNYAK
CLERK OF THE SUPREME COURT